JUDGES' BENCHBOOK

OF THE

BLACK LUNG BENEFITS ACT

CHAPTER 28
EVIDENCE AND PROCEDURE

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[Note: This is a new Chapter to the Black Lung Benchbook. Supplements to this Chapter will be maintained separately until the Chapter is incorporated into the Black Lung Benchbook.]

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Chapter 28
Rules of Procedure and Evidence

The procedural and evidential rules applicable to black lung claims are found at 20 C.F.R. Part 725 and 29 C.F.R. Part 18. Although 29 C.F.R. §§ 18.101 through 18.1104 set forth rules of evidence that are similar to rules applied in federal district courts, black lung proceedings are exempt from these provisions pursuant to 29 C.F.R. § 18.1101(b)(2) with the exception of §§ 18.403 (excluding relevant evidence on grounds of confusion or waste of time), 18.611(a) (exercising control over mode and order in interrogation of witnesses), and 18.614 (examination and cross-examination of witnesses).

In this chapter, general rules of procedure and evidence applicable to all black lung claims will be discussed. For black lung claims filed after January 19, 2001 and for a discussion of the "good cause" standard, see also **Chapter 4: Limitations on Admission of Evidence.** For a discussion of the application of the "Tobias" rule to claims filed before January 1, 1982, see **Chapter 11: Living Miner's Claims--Entitlement Under Part 718.**

I. Applicability of Federal Rules of Civil Procedure

Certain Federal Rules of Civil Procedure (FRCP) may apply to the adjudication of black lung claims pursuant to 29 C.F.R. § 18.1, if the rules are not in conflict with the Act or its implementing regulations. *Hamrick v. Eastern Associated Coal Corp.*, 12 B.L.R. 1-39 (1988).

A. Examples of application of Federal Rules of Civil Procedure

- *Trump v. Eastern Assoc. Coal Corp.*, 6 B.L.R. 1-1268 (1984) (applying **FRCP 5(b) and 30(b)(1)** that parties receive reasonable notice of a deposition in writing);

- *Arnold v. Consolidation Coal Co.*, 7 B.L.R. 1-648 (1985) (applying **FRCP 26(c)** to issue a protective order for Claimant, an Ohio resident, from the undue expense of attending Employer's physician's examination in New York);

- *Brown Badgett, Inc. v. Jennings*, 842 F.2d 899, 11 B.L.R. 2-92 (1988) (applying **FRCP 32(d)(1)** that all errors in a notice for taking a deposition are waived unless an objection is promptly served upon the party giving the notice);

- *Howell v. Director, OWCP*, 7 B.L.R. 1-259 (1984) (holding that **FRCP 41(b)** is similar to § 725.461(b) in the management of an ALJ's docket);

- *Hamrick v. Eastern Associated Coal Corp.*, 12 B.L.R. 1-39 (1988) (applying **FRCP 56** permitting an ALJ to issue summary decision *sua sponte*); *Montoya v.*

National King Coal Co., 10 B.L.R. 1-56, 1-61 (1986) (applying **FRCP 56** that summary judgment is only appropriate when no genuine issue of material fact exists), *but also see* Part XIX of this Chapter; and

- *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993) (applying **FRCP 60** to correct misidentification of a party liable for the payment of a representative's fees).

B. Discovery provisions of the FRCP inapplicable unless expressly provided by statute or regulation

The Board has held that the discovery provisions of the FRCP do not apply to black lung proceedings, unless expressly permitted by statute or regulation. In *Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-69 (1997), Claimant requested "medical information obtained by employer which employer did not intend to introduce into evidence and considered 'privileged'" during the discovery period. The Board declined to find that **FRCP 26(b)(4)(B)** applied to black lung claims. Rather, it determined that the federal procedural rules "for discovery do not apply to administrative proceedings, unless specifically provided by statute or regulation." The Board held that, on remand, the "ALJ should reconsider his Order Denying Motion to Compel in accordance with the standard for the scope of discovery provided at 29 C.F.R. § 18.14 in conjunction with the provisions of 20 C.F.R. § 725.455" under his "discretionary authority." It further stated:

> We reject, however, as overbroad, claimant's interpretation of Section 725.455 that an 'ALJ has an obligation to fully develop the record, develop the evidence, get all the evidence in . . ..' We also reject the position of claimant and the Director that the provision of 20 C.F.R. § 725.414, which requires the operator to submit evidence obtained to the district director and all parties, is extended to the administrative law judge.

II. Authority of the administrative law judge, generally

The conduct of the hearing is within the sound discretion of the ALJ. The ALJ is not bound by formal rules of evidence or procedure except as provided for at 5 U.S.C. § 501 *et seq.*, 20 C.F.R. Part 725, and 29 C.F.R. Part 18. *See* **Chapter 25, Principles of Finality.** Note, however, that there are specific limitations on the admission of evidence in claims filed after January 19, 2001, see **Chapter 4: Limitations on Medical Evidence**.

A. Unreasonable claim/defense

1. Rule 11 sanctions

In *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887 (9th Cir. 1993), the Ninth Circuit declined to rule on whether Rule 11 sanctions are incorporated into administrative proceedings through 29 C.F.R. § 18.1 because § 926 of the LHWCA provides for the assessment of costs against a party who institutes or continues a proceeding without

reasonable ground. The court held that this "impliedly includes a sanction for bad faith claims . . .." The court did state, however, that its "doubts" that Rule 11 is incorporated through § 18.1 "are increased by 20 C.F.R. § 18.29(b) which recognizes that enforcement actions against those who misbehave in proceedings before an ALJ are to be referred to the court system." *See also Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997 (5th Cir. 1995).

2. Costs

In *Crum v. Wolf Creek Collieries*, 18 B.L.R. 1-81 (1994), the Board held that "only a federal court can assess a party's costs as a sanction against a claimant who institutes or continues, without reasonable ground, workers' compensation proceedings under the LHWCA," portions of which are incorporated into the Black Lung Benfits Act pursuant to 30 U.S.C. § 931.

For additional discussion, see **Chapter 27: Representative's Fees and Representation Issues**.

B. Issues of constitutionality

The ALJ is without authority to decide issues of constitutionality. *Kosh v. Director, OWCP*, 8 B.L.R. 1-168, 1-169 (1985).

C. Determination of insurance coverage

The ALJ has jurisdiction to decide whether an insurance fund is liable under contract for the payment of benefits; however, this jurisdiction does not extend to matters outside the insurance contract. *Gilbert v. Williamson Coal Co.*, 7 B.L.R. 1-289, 1-291 and 1-292 (1984).

For additional discussion on proper designation of an operator and/or carrier, see **Chapter 7: Designation of Responsible Operator**.

D. Overpayment and repayment

In *Kieffer v. Director, OWCP*, 18 B.L.R. 1-35 (1993), the Board held that an ALJ has authority to determine whether an overpayment exists and, if so, whether the miner is liable for its repayment. However, an ALJ does not have authority to determine a repayment schedule.

For additional discussion, see **Chapter 18: Overpayment; Waiver; and Recovery.**

E. Reconsideration

1. Consecutive motions not permitted

In *Midland Coal Co. v. Director, OWCP,* 149 F.3d 558 (7th Cir. 1998), the court held that an ALJ has jurisdiction to adjudicate a motion for reconsideration, if it is filed within 30 days of the date of issuance of his or her decision. The ALJ is not empowered, however, to entertain subsequent motions for reconsideration filed outside the 30 day time period.

In *Knight v. Director, OWCP*, 14 B.L.R. 1-166 (1991), the Board held that a second motion for reconsideration, which was filed within 30 days of the decision on reconsideration but not within 30 days of the original decision and order, was untimely. Moreover, the Board concluded that, even if the second motion was timely, it improperly raised issues which were not raised in the first motion.

2. Submission of evidence on reconsideration

In *Hensley v. Grays Knob Coal Co.*, 10 B.L.R. 1-88, 1-91 (1987), the Board held that the ALJ had jurisdiction to consider a motion for reconsideration, which was filed within 30 days of the date the decision and order became "effective" pursuant to §§ 725.479 and 725.480. The Board then concluded that the ALJ may, but is not required to, accept new evidence on reconsideration. Prior to admitting such evidence, however, the ALJ must find that "good cause" existed for failure to obtain and exchange the evidence in compliance with Section 725.456(b)(2).

For additional discussion of motions for reconsideration, see **Chapter 25: Principles of Finality** and **Chapter 26: Motions.**

F. Interest and penalties

An ALJ does not have authority to decide issues involving the computation of interest or penalties assessed against an employer for reimbursements owed to the Black Lung Disability Trust Fund for medical benefits paid by the Fund. *Wade v. Island Creek Coal Co.*, BRB No. 93-549 BLA (Feb. 22, 1996) (unpub.). *See also Bethenergy Mines v. Director,* OWCP, 32 F.3d 843 (3rd Cir. 1994); *Vahalik v. Youghiogheny & Ohio Coal Co.*, 970 F.2d 161 (6th Cir. 1992); *Brown v. Sea "B" Mining Co.*, 17 B.L.R. 1-115 (1993) (en banc); *Balaban v. Duquesne Light Co.*, 16 B.L.R. 1-120 (1992).

Of interest, in *Nowlin v. Eastern Associated Coal Corp.,* 331 F.Supp.2d 465 (N.D. W. Va. 2004), the court held that a widow was entitled to a 20 percent penalty on unpaid benefits from Employer, despite the fact that she received timely payments of benefits from the Black Lung Disability Trust Fund.

For additional discussion of issues regarding assessments of interest and penalties, see **Chapter 21: Interest on Past Due Medical Bills and Penalties**.

G. Summary judgment

1. ALJ has *sua sponte* authority

The ALJ has authority to issue orders of summary judgment *sua sponte* where the parties have been given notice and an opportunity to respond. In this vein, the Board concluded that FRCP 56, permitting *sua sponte* summary judgment orders by a judge, applies to black lung proceedings because it is "not inconsistent" with § 725.452(c) of the regulations. Under the facts of the case, the ALJ provided 100 days' notice of the hearings to be conducted and requested that the parties exchange evidence 40 days prior to the hearing. Thirty days before the hearing the ALJ *sua sponte* issued an order to show cause why the claims should not be denied based upon the evidence received. The Board held that the ALJ had authority to issue the order. However, it warned that such deviation from standard procedures was "strongly discouraged" because of the "negative" affect on the process. *Smith v. Westmoreland Coal Co.*, 12 B.L.R. 1-39, 1-43 (1988), *aff'd. sub nom., Henshew v. Royal Coal Co.*, 871 F.2d 417 (4th Cir. 1989)(table).

2. ALJ does not have *sua sponte* authority

In *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425 (6th Cir. 1998), the Sixth Circuit held that an ALJ may issue a decision without holding a hearing only if the parties agree to (1) a waiver of the hearing, or (2) a party moves for summary judgment. The court noted the following:

> A hearing is not necessary if all parties give written waiver of their rights to a hearing and request a decision on the documentary record. (citation and footnote omitted). The only other instance in the regulations which permits a decision without holding a requested hearing is when a party moves for summary judgment, and the ALJ determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See 20 C.F.R. § 725.452(c). As the Director points out, '[t]here is no regulatory provision which would permit an administrative law judge to initiate summary judgment proceedings sua sponte.' (citation omitted).

For additional discussion and case law on summary judgment, see Part XIX of this Chapter.

H. Failure to file timely controversion

In *Pyro Mining Co. v. Slaton*, 879 F.2d 187, 12 B.L.R. 2-238 (6th Cir. 1989), the Sixth Circuit held that it is within the jurisdiction of the ALJ to determine, upon *de novo* review of the issue, whether Employer established "good cause" for its failure to timely controvert the claim. The Board adopted this holding in *Krizner v. U.S. Steel Mining Co.*, 17 B.L.R. 1-31 (1992)(en banc) wherein it held that any party dissatisfied with the district director's determination on the issue of timeliness of filing a controversion or finding "good cause" for an untimely filing is entitled to have the issued decided *de novo* by an ALJ.

If the ALJ finds that Employer failed to timely controvert the claim, then entitlement is established. *See* 20 C.F.R. § 725.413(b)(3) (2001).

For additional discussion of failure to timely controvert a claim, see **Chapter 26: Motions.**

I. Discretionary finding on procedural matter by ALJ is binding

An ALJ's discretionary finding on a procedural matter is not subject to modification. By unpublished decision in *Bowman v. Director, OWCP*, BRB No. 03-0720 BLA (Sept. 10, 2004) (unpub.), the Board held that an ALJ's "discretionary determination that the Director established good cause for the untimely submission of Dr. Green's report is not subject to modification because (the ALJ) was resolving a procedural matter that is not within the scope of issues that are subject to modification, *i.e.*, issues of entitlement." The Board further stated that the "proper recourse for correction of error, if any, would have been a timely appeal or motion for reconsideration, neither of which were timely pursued."

J. Remand for further evidentiary development—authority limited

It was error for the ALJ to remand a claim to the district director for further evidentiary development where "the administrative law judge did not find the evidence to be incomplete on any issue before him but rather required the development of cumulative evidence." The Board held that, "unless mutually consented to by the parties under 20 C.F.R. § 725.456(b)(2), further development of the evidence by the administrative law judge is precluded." *Morgan v. Director, OWCP*, 8 B.L.R. 1-491, 1-494 (1986).

III. Closing the record

A. Decision on the record–ALJ's discretion to consider briefs

Where Employer consented to a decision on the record without a hearing and "requested" 30 days to submit a written memorandum, the ALJ did not violate

Employer's due process rights by issuing a decision without considering Employer's memorandum. The court noted that 29 C.F.R. § 18.53 and 20 C.F.R. § 725.459A (1992) "demonstrate that the ALJ had discretion to accept legal memoranda, and was not required to accept [Employer's] memorandum." Because Employer's consent to a decision on the record was not contingent upon the ALJ's consideration of its memorandum, Employer's due process rights were not violated. *Freeman United Coal Mining Co. v. Cooper*, 965 F.2d 443 (7th Cir. 1992).

B. Submission of evidence post-hearing

1. Untimely

a. Evidence excluded

Closing the record was not an abuse of discretion where the record was held open for ten months to allow the Director to submit an x-ray re-reading and the Director failed to do so. *Amorose v. Director, OWCP*, 7 B.L.R. 1-899, 1-900 (1985).

b. Evidence admitted

In *Pendleton v. U.S. Steel Corp.*, 6 B.L.R. 1-815, 1-819 n. 4 (1984), the Board held that it was proper for the ALJ to accept a physician's report submitted two days after the record closed where Claimant's attorney "explained that the report was forwarded to the administrative law judge on the date it was received."

2. Must permit responsive evidence if "late" evidence is admitted

When late evidence, such as a medical report, is submitted, the opposing party must be provided an opportunity to respond to the medical report or to cross-examine the physician who prepared the report. *North American Coal Co. v. Miller*, 870 F.2d 948, 12 B.L.R. 2-222 (3d Cir. 1989); *Fowler v. Freeman United Coal Mining Co.*, 7 B.L.R. 1-495 (1984), *aff'd sub. nom., Freeman United Coal Mining Co. v. Director, OWCP*, No. 85-1013 (7th Cir. Jan. 24, 1986)(unpub.).

3. Results of pulmonary evaluation; record incomplete

Twenty-nine C.F.R. § 18.54, which addresses the procedure for closing the record, does not preclude submission of a complete pulmonary examination by the Department of Labor where the record is incomplete as to any issue in a claim filed under 20 C.F.R. § 725.309. However, Employer must be provided an opportunity to submit responsive evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 B.L.R. 1-84 (1994).

4. Failure of opposing party to receive copy of evidence submitted at hearing

Due process required a remand to the ALJ to reopen the record where Employer never received a copy of a report admitted at hearing and where "the administrative law judge appears to have been unaware of this fact when employer moved to close the record." *Pendleton v. U.S. Steel Corp.*, 6 B.L.R. 1-815, 1-819 (1985).

C. Error to close record prematurely

The ALJ violated the parties' rights to a "full and fair" hearing by prematurely closing the record. Specifically, the ALJ left the record open for a party to file responsive evidence, but erred in issuing her decision two weeks prior to the date the record closed. *Lane v. Harman Mining Corp.*, 5 B.L.R. 1-87, 1-90 (1982).

For additional discussion of the submission of evidence post-hearing, see also **Chapter 4: Admission of Evidence** and **Chapter 26: Motions** as well as Parts VI and VIII of this Chapter.

IV. Continuances

A. Denial proper

1. Counsel failed to appear

It is within the ALJ's discretion to proceed with a hearing despite the absence of Claimant's counsel. The ALJ acted properly in a case where Claimant was present at the hearing without counsel, and the ALJ inquired whether he wished to proceed after fully informing Claimant of his rights with respect to the presentation of his case. The ALJ also left the record open for the submission of post-hearing evidence by counsel. The Board concluded that, pursuant to 20 C.F.R. § 725.454(d), counsel failed to provide ten days' notice of his request for continuance and his "scheduling conflict" did not constitute "good cause" to grant a continuance. In particular, counsel notified the ALJ of a scheduling conflict 20 minutes after the hearing was to start. In denying the continuance, the ALJ noted that Claimant traveled 400 miles to the hearing location, waited five hours for the hearing to commence, and chose to proceed without counsel when asked on two occasions. *Prater v. Clinchfield Coal Co.*, 12 B.L.R. 1-121 (1989).

2. Party failed to timely obtain evidence

Denial of a continuance requested by Employer was proper where Employer wanted to obtain autopsy slides for an independent review, but had access to the slides and failed to secure them for one year. As noted by the Board, Claimant consented to release of the autopsy slides, but "Employer simply failed to secure the evidence in a timely fashion." *Witt v. Dean Jones Coal Co.*, 7 B.L.R. 1-21 (1984).

3. Third continuance request; claimant failed to appear

The ALJ acted within his discretion in proceeding with a hearing despite Claimant's absence. Claimant's right to participate fully at the hearing was adequately protected where the ALJ allowed Claimant an opportunity to submit a sworn statement in lieu of live testimony within 30 days of the hearing. The Board further concluded that the ALJ did not abuse his discretion in denying Claimant's third request for a continuance. *See* 20 C.F.R. § 725.452(b); *Wagner v. Beltrami Enterprises*, 16 B.L.R. 1-65 (1990).

B. Denial improper

Statutory right to representation; first continuance request

The Board vacated an ALJ's denial of benefits and remanded the claim for a *de novo* hearing on grounds that the ALJ had abused his discretion in denying Claimant's request for a continuance. Claimant was entitled to be represented by counsel but could not retain one by the date of the initial hearing. Moreover, Claimant did not waive his "statutory" right to counsel, the Director did not oppose the continuance, and this was the first request for a continuance submitted in the case. *Johnson v. Director, OWCP*, 9 B.L.R. 1-218, 1-220 (1986).

For additional discussion of continuances, see **Chapter 26: Motions.**

V. Decision of the administrative law judge

A. Compliance with APA's requirements

The requirements of the APA at 5 U.S.C. §§ 554, 556, and 557 direct that the ALJ issue a decision containing findings of fact and conclusions of law with supporting rationale. *Arjonov v. Interport Maintenance Co.*, 34 B.R.B.S. 15 (2000) ("The APA requires an administrative law judge to adequately detail that rationale behind her decision, analyze and discuss the relevant evidence of record, and explicitly set forth the reasons for her acceptance or rejection of such evidence"); *Boggs v. Falcon Coal Co.*, 17 B.L.R. 1-62 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 B.L.R. 1-162 (1989).

1. Adopting party's brief constitutes error

The Board remanded a case and directed that the ALJ independently evaluate the evidence of record instead of adopting the Director's post-hearing brief in its entirety. It concluded that, "[i]f a decision cannot withstand scrutiny on the four corners of the document, parties are compelled to rely on a document with which they may be unfamiliar, and which may not be easily accessible." The Board further noted that the Director's brief contained factual errors. *Hall v. Director, OWCP*, 12 B.L.R. 1-80 (1988).

2. Correction of clerical error

The ALJ may correct the misidentification of a party liable for attorney's fees pursuant to Federal Rule of Civil Procedure 60(a) where such misidentification constituted a mere clerical error. *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993). *See also Allied Materials Corp. v. Superior Products Co.*, 620 F.2d 224, 226 (10th Cir. 1980).

3. Delay in issuance of decision and order; intervening case law

A delay in the issuance of a decision by the ALJ did not constitute prejudicial error where intervening case law did not substantively affect the claim. *Worrell v. Consolidation Coal Co.*, 8 B.L.R. 1-158, 1-162 (1985) (the ALJ found § 727.203(b)(2) rebuttal and the change in law addressed only (b)(3) rebuttal; other intervening law requiring that more weight be given to examining physicians' opinions did not affect the ALJ's decision since both parties submitted such reports).

An ALJ's decision is not invalid merely because it is not filed within 20 days of the date the record is closed. A delay of more than 20 days in issuing a decision does not warrant a remand for a new hearing unless the aggrieved party establishes prejudice due to the delay. *Williams v. Black Diamond Coal Mining Co.*, 6 B.L.R. 1-188 (1983).

4. Evidence generated by adverse, dismissed party

An ALJ may properly admit evidence obtained by an adverse party who was dismissed prior to the hearing. *York v. Benefits Review Board*, 819 F.2d 134, 10 B.L.R. 2-99 (6th Cir. 1987). *See also Hardisty v. Director, OWCP*, 7 B.L.R. 1-322, *aff'd* 776 F.2d 129, 8 B.L.R. 2-72 (7th Cir. 1985) (the court held that the Director could contest an ALJ's award and could benefit from evidence developed by a dismissed employer even though the Director had supported Claimant's pursuit of benefits while the case was pending before the ALJ and had joined in Claimant's objection to the admission of the evidence at that time).

B. Service by certified mail

By law, all final orders, supplemental orders regarding fees and costs, and decisions on the merits must be served by certified mail to counsel for the claimant and employer. If a party appears *pro se*, then the document must be served via certified mail to that party. 20 C.F.R. § 725.478 (2001).

1. Decision final within 30 days

The ALJ's decision becomes final thirty days after it is filed in the district director's office. The ALJ is without authority to extend the 30-day time period. *Mecca v. Kemmerer Coal Co.*, 14 B.L.R. 1-101 (1990).

2. Defect in notice

The Sixth Circuit held that, even though notice of an ALJ's adverse decision had not been sent to Claimant's attorney, the attorney had actual notice of the decision and, therefore, the defect in notice would not toll the 30-day period for filing an appeal. Claimant was hospitalized when his wife signed for the certified letter and advised the attorney of the decision. *Wellman v. Director, OWCP*, 706 F.2d 191, 193 (6th Cir. 1983).

The Third Circuit also held that, where Employer's counsel was not served with the district director's award, but had actual knowledge of the decision and did not file a controversion, the 30-day period for filing such a controversion was not tolled. *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1329, 12 B.L.R. 2-60, 2-72 and 2-73 (3rd Cir. 1988). However, the Third Circuit concluded that, where an attorney was not served with the ALJ's decision and where he did not have actual notice of the decision, the 30-day time period from the date the decision was filed with the district director was tolled. *Patton v. Director, OWCP*, 763 F.2d 553, 560, 7 B.L.R. 2-216, 2-227 and 2-228 (3rd Cir. 1985).

For additional discussion of "actual receipt" of a decision, see the discussion on circuit court jurisdiction at **Chapter 1: Introduction to the Claims Process and Research Tools.**

VI. Depositions

For a discussion of the presentation of expert witness testimony at the hearing, see Part VIII of this Chapter.

A. Adequate notice required

The regulatory provisions at 20 C.F.R. § 725.458 (2001) provide, in part, that "[t]he testimony of any witness or party may be taken by deposition or interrogatory according to the rules of practice of the Federal district court for the judicial district in which the case is pending (or of the U.S. District Court for the District of Columbia if the case is pending in the District or outside the United States), except that at least 30 days prior notice of any deposition shall be given to all parties unless such notice is waived."

1. Reasonable notice in writing; objections and waiver

The Board applied FRCP 30(b)(1), which requires that the party taking a deposition give "reasonable notice in writing to every other party to the action." The Board further noted that FRCP 5(b) requires that service be made upon the attorney representing a party unless otherwise ordered by the ALJ. Thus, it was error to admit deposition testimony where claimant's lay representative was not given notice of the deposition. The Board concluded that the fact that Claimant's representative was not a member of the Bar was irrelevant as "[a] lay representative, once qualified, holds the

same powers and is bound by the same procedural rules as an attorney." However, the Board held that the error in admitting the deposition was cured because the ALJ left the record open for 30 days to allow Claimant to cross-examine witnesses. *Trump v. Eastern Assoc. Coal Corp.*, 6 B.L.R. 1-1268 (1984).

In *Brown Badgett, Inc. v. Jennings*, 842 F.2d 899, 11 B.L.R. 2-92 (6th Cir. 1988), Employer sent notice of a deposition to Claimant's counsel's partner, but Claimant's counsel never received the notice. The Sixth Circuit held that FRCP 32(d)(1) is applicable to proceedings arising under the Act such that a deposition taken in violation of the thirty-day notice requirement set forth in 20 C.F.R. § 725.458 was admissible unless the opposing party expressly objects, in writing, to "[a]ll errors and irregularities" in service of the notice of deposition. The court then remanded the claim for a determination of whether objections to the defective notice were waived because Claimant's counsel did not file objections in writing. The court cautioned that "[o]bviously, it is impossible to serve a written objection to a defective notice if, in fact, no notice at all is provided." Thus, the court instructed that a determination be made as to whether Claimant's counsel's objections were waived under the facts of the case.

2. Location of deposition; right of cross-examination

It was proper to apply FRCP 26(c) to the scheduling of depositions. The Board held that good cause was established for issuance of a protective order for Claimant, an Ohio resident, from having to incur the undue expense of attending a deposition of Employer's physician in New York, NY. The Board noted that Employer declined the ALJ's offer to permit a post-hearing deposition of the physician by telephone. As a result, the Board held that "Employer will not now be heard to complain that it was not given an opportunity to depose Dr. Kleinerman." *Arnold v. Consolidation Coal Co.*, 7 B.L.R. 1-648 (1985).

3. Expert witness provisions at § 725.457 inapplicable

Section 725.457 states, in part, that "[a]ny party who intends to present the testimony of an expert witness at a hearing shall so notify all other parties to the claim at least 10 days before the hearing." The Board has held that § 725.457(a) applies only to the appearance by an expert witness at the hearing, not to the introduction of deposition testimony at the hearing. A deposition taken five days before the hearing did not deny due process to other parties who had received adequate notice of the deposition pursuant to § 725.458. *Tucker v. Eastern Coal Corp.*, 6 B.L.R. 1-743 (1984).

B. Submission of pre-hearing deposition

1. Generally

In ruling on the submission of deposition testimony, it is important to understand the distinction between submission of a *pre-hearing* deposition before, at, or after the hearing as opposed to the submission of a *post-hearing* deposition. As long as 30 days'

notice is properly given, a *pre-hearing* deposition is admissible before, during, or after the hearing. A *pre-hearing* deposition does not have to be exchanged in accordance with the 20-day rule and ten days' notice of a party's intention to submit expert witness testimony by deposition does not have to be provided in advance of the hearing date. As an example, a deposition conducted within five days of the date of the hearing was admissible post-hearing where the opposing parties were given 30 days' notice of the deposition. *Tucker v. Eastern Coal Corp.*, 6 B.L.R. 1-743 (1984).

On the other hand, as is discussed later in this Chapter, it is within the ALJ's discretion to permit and admit a *post-hearing* deposition. Indeed, the Board has set forth specific factors to be considered in determining whether to permit a post-hearing deposition, including whether the party has diligently tried to secure such evidence prior to the hearing. *See Lee v. Drummond Coal Co.*, 6 B.L.R. 1-544 (1983).

2. Pre-hearing deposition submitted post-hearing

Although 20 C.F.R. § 725.458 provides, in part, that "[n]o post-hearing deposition or interrogatory shall be permitted unless authorized by the administrative law judge upon the motion of a party to the claim," these provisions are not applicable to the post-hearing submission of a deposition taken pre-hearing. When adequate notice was given and a deposition was taken five days prior to the hearing, the Board held that the ALJ erred when he denied a request to admit the deposition post-hearing under § 725.458 of the regulations. *Tucker v. Eastern Coal Corp.*, 6 B.L.R. 1-743 (1984).

Similarly, in another case, the Board held that it was error for the ALJ to exclude pre-hearing deposition testimony from being admitted post-hearing pursuant to § 725.458 of the regulations. The Board noted that counsel had provided 30 days' notice of the two pre-hearing depositions, which it sought to admit within 10 days of the hearing (after the depositions were transcribed). In response to the 30 days' notice of depositions, Claimant was evaluated by his physician and sought to submit the resulting medical report within 30 days of the hearing. Initially, the ALJ granted all three requests. However, when Employer then sought to depose Claimant's physician after Claimant's medical report was submitted as evidence, the ALJ "reversed his earlier ruling and denied all motions for the admission of evidence post-hearing" so that he could "close these cases on a date certain." The Board held that this constituted an abuse of discretion. With regard to Employer's post-hearing submission of two pre-hearing depositions, the Board noted that Claimant had ample notice of the scheduled depositions; his counsel was present to conduct cross-examination; and the transcripts of the depositions would not be available until after the hearing through no fault of Employer. The Board further held that Claimant's post-hearing submission of a medical report based upon the pre-hearing examination by his physician must also be submitted in the interests of fairness and that the record must then be left open for 30 days under § 725.456(b)(3) for the filing of any responsive evidence, *i.e.* Employer's cross-examination of Claimant's physician. *Ference v. Rochester & Pittsburgh Coal Co.*, 5 B.L.R. 1-122 (1982).

In *Hardisty v. Director, OWCP*, 7 B.L.R. 1-322 (1984), *aff'd* 776 F.2d 129, 8 B.L.R. 2-72 (7th Cir. 1985), the Board held that the scheduling of depositions shortly before the hearing is permissible where opposing counsel received six weeks' notice of the deposition and he attended the deposition and cross-examined the witnesses.

C. Submission of post-hearing deposition

Section 725.458 provides, in part, that "[n]o post-hearing deposition or interrogatory shall be permitted unless authorized by the administrative law judge upon the motion of a party to the claim." 20 C.F.R. § 725.458 (2001).

1. Factors to be considered

Post-hearing depositions may be obtained with the permission, and in the discretion, of the ALJ pursuant to § 725.458. The party taking the deposition "bears the burden of establishing the necessity of such evidence." Among the factors to consider in determining whether to admit post-hearing depositions are the following: (1) whether the proffered deposition would be probative and not merely cumulative; (2) whether the party taking the deposition took reasonable steps to secure the evidence before the hearing or it is established that the evidence was unknown or unavailable at any earlier time; and (3) whether the evidence is reasonably necessary to ensure a fair hearing.

Under the facts of *Lee v. Drummond Coal Co.*, 6 B.L.R. 1-544 (1983), the ALJ properly refused to permit a post-hearing deposition of a physician for the purpose of clarifying his earlier report. On the other hand, it was an abuse of discretion for the ALJ to refuse the physician's post-hearing deposition where he commented on additional medical evidence, which was unknown prior to the hearing because the opposing party failed to fully answer interrogatories. Due process would be satisfied in permitting the post-hearing deposition as the opposing party would have an opportunity to cross-examine the physician during the deposition.

2. Exclusion proper

In *Seese v. Keystone Coal Mining Co.*, 6 B.L.R. 1-149, 1-152 (1983), the ALJ denied Employer's request to submit a post-hearing deposition of its physician for the purpose of explaining shortcomings in the physician's earlier testimony. The Board upheld the ALJ's decision because "[n]o proffer of evidence accompanied the request" and no indication was given that the denial would deprive movant of a reasonable opportunity to present evidence.

3. Exclusion improper

a. ALJ admitted one party's post-hearing evidence but did not admit opposing party's post-hearing evidence

It was arbitrary for the ALJ to deny Employer's request for a post-hearing deposition of Claimant's physician, while granting Claimant's request to admit a post-hearing physical examination by the physician. *Schoenecker v. Allegheny River Mining Co.*, 5 B.L.R. 1-378 (1982).

b. Party's evidence submitted post-hearing subject to opposing party's opportunity to cross-examine

The ALJ abused his discretion in denying admission of a post-hearing deposition where Claimant's medical opinion was admitted at the hearing subject to Employer's opportunity to cross-examine the physician. Claimant's counsel was ordered to arrange the deposition, but failed to do so prior to the closing of the record. The Board directed that, on remand, the ALJ must provide Employer an opportunity to subpoena and depose the physician, or to specifically waive this right. *Jug v. Rochester and Pittsburgh Coal Co.*, 1 B.L.R. 1-628 (1978).

c. Evidence submitted on eve of the 20-day deadline

For a medical report submitted on the eve of the 20-day deadline, a party must be provided an opportunity to respond to the medical report or to cross-examine the physician who prepared the report. Because Claimant's physician's report was ***sent*** 20 days prior to the hearing, depriving Employer of the opportunity to submit rebuttal in compliance with the 20-day rule, the court reasoned that it was incumbent upon the ALJ to permit Employer the opportunity to (1) submit a post-hearing rebuttal opinion and (2) cross-examine Claimant's physician. The court further determined that permitting the rebuttal evidence would not result in the "spector of a never ending series of rebuttals" because, pursuant to 5 U.S.C. § 556(d), the ALJ may exclude "irrelevant, immaterial or unduly repetitious evidence." *North American Coal Co. v. Miller*, 870 F.2d 114, 12 B.L.R. 2-222 (3rd Cir. 1989).

d. Evidence was unknown or unavailable prior to hearing due to opposing party's failure to cooperate

It was an abuse of discretion for the ALJ to refuse a physician's post-hearing deposition wherein he commented on additional medical evidence that was unknown prior to the hearing. In particular, the Board noted that the opposing party failed to fully answer interrogatories. Due process would be satisfied in permitting the post-hearing deposition because the opposing party would have an opportunity to cross-examine the physician during the deposition. *Lee v. Drummond Coal Co.*, 6 B.L.R. 1-544 (1983).

VII. Due process

A. Notice required for transfer of case to another ALJ

1. On remand

A *de novo* hearing was required on grounds that the parties' procedural due process rights were violated because: (1) notice that the case was reassigned on remand was not given until the decision and order on remand was issued; and (2) the parties were not given an opportunity to express any objections about the transfer of the case or to request a new hearing. *McRoy v. Peabody Coal Co.*, 11 B.L.R. 1-107 (1987). However, the Board limited *McRoy* to its facts and held that where credibility of witnesses is not at issue, a substituted ALJ need not hold a *de novo* hearing on remand. *Edmiston v. F&R Coal Co.*, 14 B.L.R. 1-65 (1990).

In *Strantz v. Director, OWCP*, 3 B.LR. 1-431 (1981), the Board held that, pursuant to 5 U.S.C. § 554(d), "the same administrative law judge who heard the case the first time should hear the case on remand unless he is unavailable." If an ALJ is unavailable, then the parties must be notified, and they should be given "an opportunity to express any objections to the transfer of the case to another administrative law judge or request a *de novo* hearing." A new hearing should be held if witness credibility is at issue.

2. On modification

In *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388 (6th Cir. 1998), the court held that, because the original deciding ALJ was no longer with the agency, a modification case was properly reassigned to another ALJ after notice was provided to the parties. Claimant argued "that it was error to change the ALJ assigned to his case during the pendency of his proceeding." The court cited to 29 C.F.R. § 18.30 which authorizes the Chief ALJ to reassign a claim where the original deciding judge is no longer available. It then concluded that "[a]s no party objected to the reassignment after notice and because the proper procedures for reassignment were followed, we find no merit in Cunningham's argument."

B. Timely notice; opportunity to fully present case

For a discussion of timely notice regarding conducting and submitting depositions, see Part VI of this Chapter.

1. Presentation of evidence

a. Copy of opposing party's evidence

Procedural due process requires that interested parties be notified of the pendency of an action and afforded the opportunity to present objections. The Board held that,

although Claimant failed to serve Employer with an autopsy report after the record was reopened, the ALJ did send it to Employer. The Board concluded that "service of the autopsy report by the administrative law judge provided employer adequate notice of the pending admission of the autopsy report." The Board further stated that "[a] party may waive its right to cross-examine an opponent's medical evidence by failure to object to the proffered evidence" and it was acceptable for the ALJ to conclude that Employer waived its objection to admission of the autopsy report because Employer failed to object before the ALJ issued a decision. *Gladden v. Eastern Assoc. Coal Corp.*, 7 B.L.R. 1-577, 1-579 (1984).

b. Expert witness testimony

Although Claimant served proper notice on the Director that Claimant would present the testimony of his treating physician, the Director objected, arguing that he did not know the physician intended to testify regarding 1983 examinations of Claimant. The Board accepted an interlocutory appeal in the case and concluded that the ALJ properly admitted the testimony of the physician. *Morgan v. Director, OWCP*, 8 B.L.R. 1-491, 1-494 (1986).

Testimony of an expert witness presented at the hearing was stricken because of the proponent's failure to give actual notice to the other parties at least ten days in advance of the hearing pursuant to § 725.457(a). Claimant presented expert physician witness testimony at the hearing and the Director, who was not present at the hearing and was not notified that the physician would be testifying, filed a motion to strike which the ALJ should have sustained. *Hamric v. Director, OWCP*, 6 B.L.R. 1-1091 (1984).

c. Failure to notify representative of examination; evidence excluded

The ALJ properly refused to admit a non-qualifying blood gas study offered by Employer because the study was scheduled by Carrier without notifying Claimant's counsel. Although Employer provided more than 20 days' notice of its intent to proffer the evidence at the hearing, the ALJ concluded "that the procuring of the blood gas study without first notifying claimant's attorney effectively circumvented claimant's right to legal representation" in contravention of 20 C.F.R. § 725.364. It was also proper for the ALJ to deny Employer the opportunity to acquire another blood gas study because, under § 725.455, the ALJ was under no affirmative duty to seek out and receive all relevant evidence. *McFarland v. Peabody Coal Co.*, 8 B.L.R. 1-163, 1-165 (1985).

2. Notice to carrier

Due process requires that an insurance carrier be given written notice of a black lung claim prior to the administrative adjudication of the claim affecting the carrier's liability. *Warner Coal Co. v. Director, OWCP [Warman]*, 804 F.2d 346, 11 B.L.R. 2-62 (6th Cir. 1986). *See also Nat'l Mines Corp. v. Carroll*, 64 F.3d 135 (3rd Cir. 1995); *Tazco*,

Inc. v. Director, OWCP, 895 F.2d 949 (4th Cir. 1990); *Caudill Construction Co. v. Abner*, 679 F.2d 1086, 12 B.L.R. 2-335, 2-338 (6th Cir. 1989).

3. Delay in notice of liability

Employer alleged that a five year delay in receiving notification of its potential liability from the date the claim was filed prevented it from obtaining a physician's report. The court held that the DOL followed its regulations in notifying Employer of its liability and that Employer was not unduly prejudiced because the ALJ found the report "unpersuasive." The court further held that "[t]he operator did have ample opportunity to defend against the claims at issue." *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 B.L.R. 2-95 (6th Cir. 1989).

For additional discussion of the consequences of a delay in notifying a potentially responsible operator or carrier of liability or losing parts of a record, see **Chapter 7: Designation of Responsible Operator.**

C. Issuance of decision and order

The Sixth Circuit held that, even though notice of an ALJ's adverse decision had not been sent to Claimant's attorney, the attorney had actual notice of the decision and, therefore, the defect in notice would not toll the 30-day period for filing an appeal. Claimant was hospitalized when his wife signed for the certified letter and advised the attorney of the decision. *Wellman v. Director, OWCP*, 706 F.2d 191 and 193, 5 B.L.R. 2-81, 2-83 (6th Cir. 1983).

The Third Circuit also held that, where Employer's counsel was not served with the district director's award, but had actual knowledge of the decision and did not file a controversion, the 30-day period for filing such a controversion was not tolled. *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1329, 12 B.L.R. 2-60, 2-72 and 2-73 (3d Cir. 1988). However, the Third Circuit concluded that, where an attorney was not served with the ALJ's decision and where he did not have actual notice of the decision, the 30-day time period from the date the decision was filed with the district director was tolled. *Patton v. Director, OWCP*, 763 F.2d 553, 560, 7 B.L.R. 2-216, 2-227 and 2-228 (3d Cir. 1985).

For additional discussion of "actual receipt" of a decision, see the discussion on circuit court jurisdiction at **Chapter 1: Introduction to the Claims Process and Research Tools.**

VIII. Expert witness testimony

Pursuant to § 725.457(a), "[a]ny party who intends to present the testimony of an expert witness at a hearing shall so notify all other parties to the claim at least 10 days before the hearing." The regulation provides that "failure to give notice of the appearance of an expert witness in accordance with this paragraph, unless notice is

waived by all parties, shall preclude the presentation of testimony by such expert witness." 20 C.F.R. § 725.457(a). *See* Part VI of this Chapter for submission of expert testimony by deposition.

A. Actual notice of intent to present required

Testimony of an expert witness presented at the hearing was stricken because of the proponent's failure to give actual notice to the other parties at least ten days in advance of the hearing pursuant to § 725.457(a) of the regulations. Claimant presented expert physician witness testimony at the hearing and the Director, who was not present at the hearing and was not notified that the physician would be testifying, filed a motion to strike which the ALJ should have sustained. *Hamric v. Director, OWCP*, 6 B.L.R. 1-1091 (1984).

B. Expert witness provisions at § 725.457 inapplicable to expert deposition testimony

Section 725.457 states, in part, that "[a]ny party who intends to present the testimony of an expert witness at a hearing shall so notify all other parties to the claim at least 10 days before the hearing." The Board has held that 20 C.F.R. § 725.457(a) applies only to the appearance by an expert witness at the hearing, not to the introduction of deposition testimony at the hearing. A deposition taken five days before the hearing did not deny due process to other parties who had received adequate notice of the deposition pursuant to 20 C.F.R. § 725.458. *Tucker v. Eastern Coal Corp.*, 6 B.L.R. 1-743 (1984).

IX. Failure to attend hearing

Pursuant to 20 C.F.R. §§ 725.461(b) and 725.465, the unexcused failure of a party to attend the hearing constitutes a waiver of the right to present evidence at the hearing and may result in a dismissal of the claim. Dismissal is proper where Claimant and Claimant's representative fail to appear at the hearing absent a showing of "good cause." The ALJ is required to issue an order to show cause prior to dismissing the claim. *See e.g. Clevinger v. Regina Fuel Co.*, 8 B.L.R. 1-1 (1985) (no good cause established where: (1) counsel stated that he had not received the notice of hearing ; (2) the ALJ noted that counsel was present at prior hearings, which were scheduled in the same notice; and (3) counsel failed to respond to the ALJ's order to show cause).

A. Physical ailment; ALJ to make every reasonable accommodation

If Claimant is physically unable to attend a hearing, the ALJ should make every effort to obtain his or her testimony by deposition or by holding the hearing at a location most convenient to Claimant, including Claimant's home if s/he is bedridden. In this vein, the Board held that it was improper for the ALJ to dismiss a claim as abandoned where Claimant's counsel advised him that Claimant recently underwent a cancer

operation and was unable to attend the hearing. *Robertson v. Director, OWCP*, 1 B.L.R. 1-932, 1-934 (1978).

The ALJ did not abuse his discretion in awarding benefits where Claimant failed to attend the hearing because of a disabling stroke. Claimant's wife, who testified at the hearing, stated that the miner's speech was impaired and he was confined to a wheelchair. The ALJ then denied Employer's motion that the claim be dismissed or denied. Employer argued that it had a right to cross-examine the miner "but did not have an affirmative burden to obtain his deposition or testimony." The Board concluded otherwise to find that the ALJ appropriately protected Employer's interests by leaving the record open for 45 days to allow Employer to secure Claimant's testimony and develop any further medical evidence. *Chaney v. Sahara Coal Co.*, 10 B.L.R. 1-8, 1-10 (1987).

B. Consideration of client's age and illness before binding client to acts of counsel

The Board concluded that the provisions at 20 C.F.R. § 725.461(b) are similar to FRCP 41(b). It held that the "rules reflect a court's inherent authority to control its docket, via dismissal, to manage the orderly and expeditious disposition of cases." The Board further held that a dismissal "may be reversed only for a clear abuse of discretion" and that a party is held to be responsible for the acts of its attorney. However, the Board did find abuse of discretion and reversed the dismissal of a claim because the ALJ did not consider Claimant's age and illness before binding her to the acts of her counsel, who failed to appear at the hearing. Moreover, the Board noted that Claimant forwarded the notice of hearing to her attorney expecting him to act and Claimant's immediate response to the order to show cause demonstrated that she was not attempting to delay the proceeding. *Howell v. Director, OWCP*, 7 B.L.R. 1-259 (1984).

C. ALJ properly proceeded with hearing despite claimant's absence

The ALJ acted within his discretion in proceeding with a hearing despite Claimant's absence. Claimant's right to participate fully at the hearing was adequately protected where the ALJ allowed Claimant an opportunity to submit a sworn statement in lieu of live testimony within 30 days of the hearing. The Board also concluded that the ALJ did not abuse his discretion in denying Claimant's third request for a continuance. *Wagner v. Beltrami Enterprises*, 16 B.L.R. 1-65 (1990).

D. Error to dismiss claim for failure to attend hearing where Director objected and payments were being made by Trust Fund

Neither Claimant nor her attorney appeared at the scheduled hearing and, by telephone, the ALJ was advised that Claimant did not wish to pursue her claim. The ALJ then issued an order to show cause why the claim should not be dismissed. The Director responded that it should be decided on the record without a hearing. Claimant also submitted a letter to state that she did not wish to withdraw her claim; that she had no further evidence to submit; and that she did not object to the submission of evidence by

Employer. The ALJ nevertheless dismissed the claim. An appeal was taken by the Director who argued that the ALJ was without authority to dismiss the case over the Director's objection where payments were being made from the Fund. The Board agreed. The Board further held, however, that:

> The employer's argument that failure to dismiss the claim would circumvent its right to a hearing is without merit. While the employer does have a right to a hearing, 20 C.F.R. § 725.450, there is no requirement that the claimant be present at such a hearing. Further, the employer may seek a subpoena compelling the claimant to attend if it feels that her testimony is necessary to protect its interests.

Palovich v. Bethlehem Mines Corp., 5 B.L.R. 1-70 (1982).

E. Inadvertent delay; no waiver of appeal rights

Employer's failure to attend the hearing did not result in a waiver of its appeal rights to the Board where the attorney fully intended to appear, but car trouble precluded his attendance. *Kimmel v. Diamond Coal Co.*, 6 B.L.R. 1-288, 1-290, n.3 (1983).

X. Fair hearing

Pursuant to 20 C.F.R. § 725.455(b), the ALJ is required to inquire fully into the matters at issue and to receive, on motion, all relevant and material testimony and documentary evidence. A full and fair hearing includes the opportunity to present a claim or defense by way of argument, proof, and cross-examination of witnesses. 5 U.S.C. § 556(d). *Laughlin v. Director, OWCP*, 1 B.L.R. 1-488, 1-493 (1973). Procedural due process requires notice and an opportunity to be heard. Parties must be allowed to fairly respond to evidence and present their own case in full.

Judicial finality "requires that claimants continue to pursue their claims or, if appropriate, that the claims be unconditionally withdrawn or dismissed." As a result, the Board concluded that orders, which held the claims in abeyance, were invalid because they lacked judicial finality. *Slone v. Wolf Creek Collieries, Inc.*, 10 B.L.R. 1-66, 1-70 (1987).

The ALJ properly determined that Claimant was not entitled to benefits because the claim was abandoned as a result of Claimant's failure to request a hearing within 60 days of the district director's denial or to petition for modification within one year of such denial. *Stephens v. Director, OWCP*, 9 B.L.R. 1-227, 1-230 (1987).

A. Impartiality required

1. Conduct of the ALJ

Claimant was denied a fair hearing because "[a]t a number of points during the hearing, the administrative law judge expressed disbelief regarding claimant's testimony and substituted his own personal knowledge and experience in place of hearing testimony." The Board further noted that the ALJ incorrectly accused Claimant's counsel of asking leading questions and impeded the examination of witnesses. *Hutnick v. Director, OWCP*, 7 B.L.R. 1-326, 1-328 (1984).

2. Treatment of witnesses

Claimant received a fair hearing despite the contention that both attorneys did not stand an equal distance from Claimant while he testified. Claimant had difficulty hearing and, as a result, Director's counsel was allowed to move closer to Claimant during questioning. There was no indication from the record that Claimant was harassed, intimidated, or prejudiced. *Casias v. Director, OWCP*, 6 B.L.R. 1-438, 1-445 (1993).

3. Competency of witnesses

The ALJ did not err in failing to explore a witness's mental capacity despite contention that his speech impairment impeded his ability to testify because the ALJ afforded the lay representative great latitude, the transcript did not indicate any mental infirmity, and no formal objections to the witness's mental qualifications were raised. In this vein, the Board held that the fact-finder is in a better position than an appellate tribunal to determine whether a witness is mentally capable of testifying and that the ALJ's determination will not be overturned unless it is "clearly erroneous." *Elswick v. Eastern Assoc. Coal Corp.*, 2 B.L.R. 1-1016 (1980).

Under *Shapell v. Director, OWCP*, 7 B.L.R. 1-304 (1984), the ALJ must determine the complexity of the legal and medical problems presented in the case and must assess Claimant's ability to comprehend the issues and participate actively in their resolution. Factors to be considered include physical defects, age, formal education, apparent intelligence and general knowledge.

B. Right to oral hearing

1. On remand

a. No oral hearing necessary; witness credibility not dispositive

A motion for a new hearing is properly denied when witness credibility is not dispositive. *Berka v. North American Coal Corp.*, 8 B.L.R. 1-183, 1-184 (1985). *See also White v. Director, OWCP*, 7 B.L.R. 1-348 (1984); *Strantz v. Director, OWCP*, 3

B.LR. 1-431, 1-433 (1981); *Worrell v. Consolidation Coal Co.*, 8 B.L.R. 1-158, 1-160 (1985); *Meholovitch v. Oglebay Norton Co.*, Case No. 85-3485 (6th Cir. May 9, 1986)(unpub.).

b. New hearing required; witness credibility at issue

A new hearing is required if the credibility of witnesses is a crucial, important, or controlling factor in resolving a factual dispute. *Worrell, supra; White, supra; Strantz, supra.*

c. Notice to parties

In *Strantz v. Director, OWCP*, 3 B.LR. 1-431 (1981), the Board held that, pursuant to 5 U.S.C. § 554(d), "the same administrative law judge who heard the case the first time should hear the case on remand unless he is unavailable." If an ALJ is unavailable, then the parties must be notified and be given "an opportunity to express any objections to the transfer of the case to another administrative law judge or request a *de novo* hearing."

2. Multiple claims under § 725.309

Pursuant to *Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990) and *Dotson v. Director, OWCP*, 14 B.L.R. 1-10 (1990)(en banc), the parties are entitled to an oral hearing in a subsequent claim filed pursuant to 20 C.F.R. § 725.309 of the regulations.

3. Overpayment claims

Citing to *Califano v. Yamasaki*, 442 U.S. 682 (1979), the Board held that, in cases where the waiver of recovery is not at issue, the district director may begin recoupment prior to a hearing and decision concerning the amount of the overpayment. *Burnette v. Director, OWCP*, 14 B.L.R. 1-152 (1990).

C. Waiver of hearing

1. Waiver must be voluntary, intentional, and in writing

Pursuant to 20 C.F.R. § 725.461 (2001), "[i]f all parties waive their right to appear before the administrative law judge, it shall not be necessary for the administrative law judge to give notice of, or conduct, an oral hearing.

A request for waiver of an oral hearing must be voluntary, intentional, and in writing. *Morgan v. Carbon Fuel Co.*, 3 B.R.B.S. 302, 307 (1976).

2. Withdrawal of waiver of hearing

A waiver may be withdrawn for "good cause" at any time prior to "mailing" of the decision in the claim pursuant to 20 C.F.R. § 725.461(a) (2001). However, the ALJ may conduct a hearing despite the fact that the parties have agreed to a waiver, if s/he determines that the appearance and testimony of witnesses would be of value. 20 C.F.R. § 725.461(a).

3. Error to decide merits of claim where hearing not waived

The ALJ erred in awarding benefits on the record under 20 C.F.R. Part 727 where neither the Director nor Claimant requested a waiver of their right to a hearing in writing pursuant to 20 C.F.R. § 725.461. The Board noted that, although Claimant advised the ALJ in advance that he would not be able to attend, the "Director submits that Claimant's unjustified failure to attend the hearing prejudicially deprived the Director of the right to examine, and that claimant's testimony is crucial to the resolution of the contested issue of total disability." The Board remanded the claim for issuance of an order to show cause why the claim should not be dismissed pursuant to 20 C.F.R. § 725.465(c), which provides, in part, that "[i]n any case where a dismissal of a claim, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order." *Churpak v. Director, OWCP*, 9 B.L.R. 1-71, 1-72 and 1-73 (1986).

D. Hearing limited to contested issues

Pursuant to 20 C.F.R. § 725.421(b), the district director is required to submit to the ALJ a document setting forth the contested and uncontested issues in the claim, often referred to as the "CM-1025." Moreover, 20 C.F.R. § 725.463(a) provides that the hearing is confined to the issues listed as contested or any other issue raised in writing before the district director. The purpose of these regulatory provisions is "to expedite cases by ensuring that the parties are not surprised by new issues at the hearing, and to force the parties to develop evidence prior to the hearing." *Carpenter v. Eastern Assoc. Coal Corp.*, 6 B.L.R. 1-784, 1-786 (1984). The Board has held that "[i]ntent and notice are important criteria" to consider in applying 20 C.F.R. § 725.463(a) "to permit or prevent consideration of substantive issues." *Chaffins v. Director, OWCP*, 7 B.LR. 1-431 (1984).

For additional discussion of the issues to be adjudicated, see **Chapter 26: Motions.**

XI. Hearsay

A. Medical reports and testing

1. Elements of reliability

Medical reports that are *ex parte* may constitute substantial evidence provided that certain safeguards are met. In *Perales*, the Supreme Court held that:

> . . . a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.

Richardson v. Perales, 402 U.S. 389, 402 (1971).

The following factors must be considered in determining how much weight to accord to a "hearsay" report: (1) whether the out-of-court declarant has an interest in the result of the case; (2) whether the opposing party could have obtained the report prior to the hearing and could have subpoenaed the declarant; (3) whether the report is internally consistent on its face; and (4) whether the report is inherently reliable. *See also U.S. Pipe & Foundry Co. v. Webb*, 595 F.2d 264, 2 B.L.R. 2-7 (5th Cir. 1979).

2. Reports based on physical examinations

Properly authenticated reports written by a licensed physician who has examined the miner may be received as evidence at a hearing and, despite their hearsay character, may constitute substantial evidence supportive of a finding. *Hogarty v. Honeybrook Mines, Inc.*, 3 B.R.B.S. 485 (1976).

3. Consultative reports

In *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 B.L.R. 2-10 (3rd Cir. 1986), the Third Circuit held that a non-examining physician's report is admissible and may constitute "substantial evidence."

4. Results of objective testing

In *Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236 (1984), the Board held that x-ray, blood gas and pulmonary studies, and physicians' reports are admissible over hearsay objections. *See also U.S. Pipe & Foundry Co. v. Webb*, 595 F.2d 264, 2 B.L.R. 2-7 (5th Cir. 1979) (ex-parte physicians' reports and x-ray readings constitute probative evidence in black lung claims).

B. Affidavits

An affidavit regarding the length of coal mine employment is admissible despite challenges based on its hearsay character. *Williams v. Black Diamond Coal Mining Co.*, 6 B.L.R. 1-188 (1983). *See also White v. Douglas Van Dyke Coal Co.*, 6 B.L.R. 1-905, 1-908 n. 3 (1984).

C. Death of authoring physician

The ALJ erred in excluding a medical report as "hearsay," where the deposed physician was unavailable for cross-examination due to his death. The Board concluded that the opposing party had a fair opportunity to counter the physician's findings and, therefore, due process was satisfied. *Fowler v. Freeman United Coal Mining Co.*, 7 B.L.R. 1-495 (1984), *aff'd. sub. nom., Freeman United Coal Mining Co. v. Director, OWCP [Fowler]*, Case No. 85-1013 (7th Cir. June 24, 1986)(unpub.).

D. Evidence that is lost or destroyed

Lost, destroyed, or "otherwise unavailable" x-ray studies of a deceased miner should be handled under 20 C.F.R. § 718.102(d) (2001) as follows:

> Where the chest X-ray of a deceased miner has been lost, destroyed, or is otherwise unavailable, a report of the chest X-ray submitted by any party shall be considered in conjunction with the claim.

20 C.F.R. § 718.102(d) (2001).

Where a miner's autopsy slides were destroyed, the employer's right to cross-examine the prosector by means of deposition or hearing testimony satisfies its right to procedural due process. *Lewis v. Consolidation Coal Co.*, 15 B.L.R. 1-37 (1991) (autopsy slides were destroyed prior to the date on which Employer was named as the potential responsible operator but a "full and fair" hearing was not denied where Employer could have deposed the prosector or had his report reviewed by other physicians); *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 B.L.R. 2-95 (6th Cir. 1989) (Employer was not denied a fair hearing despite the fact that it was notified five years after the miner's death).

An x-ray re-reading was properly admitted even though the x-ray film was lost because the opposing party could depose the reader, thus satisfying its right to cross-examination. Specifically, the Board noted that "employer was on notice for eight and one-half months that the x-ray was missing and failed to avail itself of the opportunity to depose the interpreting physician." *Pulliam v. Drummond Coal Co.*, 7 B.L.R. 1-846 (1985).

XII. Judicial/Official notice

A. Procedure used

In *Pruitt v. Amax Coal Co.*, 7 B.L.R. 1-544, 1-546 (1984), the Board delineated the procedures for taking "official" notice and stated the following:

> The rules of official notice in administrative proceedings are more relaxed than in common law courts. The mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result. (citation omitted). Although the administrative law judge erred in failing to cite the "B" reader list as the source of his information regarding Dr. Morgan's qualifications, and the parties should have been afforded a full opportunity to dispute his qualifications, *Casias v. Director, OWCP*, 2 B.L.R. 1-259 (1979), the error is harmless because Dr. Morgan's name does, in fact, appear on the "B" reader list and a contrary finding cannot be made on remand. (citations omitted). Claimant has not shown that he was substantially prejudiced by the administrative law judge's action.

B. Taking official notice of one expert but not another expert constitutes error

It is noteworthy that, in *Simpson v. Director, OWCP*, 9 B.L.R. 1-99 (1986), the record was silent with regard to the B-reader status of two physicians. The ALJ erred in taking official notice of the B-reader status of one of the physician's appearing on the B-reader list without taking official notice of the other physician's name appearing on the list. This resulted in the ALJ improperly according more weight to the x-ray interpretation of one reader based upon his "superior" B-reader credentials which, as the Board concluded, was substantially prejudicial to the opposing party.

C. Examples of judicial/official notice

1. Medical opinion; no judicial notice

A medical opinion is not a fact of which judicial notice may be taken. *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994).

2. Unreliability of early Social Security records

In *Calfee v. Director, OWCP*, 8 B.L.R. 1-7, 1-9 (1985), the Board held that it was proper for the ALJ to note that early social security records were not wholly reliable in weighing Claimant's testimonial evidence and affidavits against such records.

3. Dictionary of Occupational Titles

An ALJ may take judicial notice of the Dictionary of Occupational Titles (DOT) provided s/he "does so in accord with principles concerning the taking of judicial notice." Citing to 29 C.F.R. § 18.45, 20 C.F.R. § 725.464, Fed. R. Evid. 201, and *Echo v. Director, OWCP*, 744 F.2d 327, 6 B.L.R. 2-110 (3rd Cir. 1986), it appears that the Board required that the ALJ give the parties notice and an opportunity to be heard regarding taking judicial notice of the DOT. *Onderko v. Director, OWCP*, 14 B.L.R. 1-2 (1989)

In *Snorton v. Zeigler Coal Co.*, 9 B.L.R. 1-106, 1-108 (1986), the Board held that the ALJ erred in concluding that the miner engaged in heavy labor based upon the job description contained in the DOT because the ALJ failed to comply with the requirements for taking judicial notice.

4. Directory of Medical Specialists

In *Maddaleni v. The Pittsburgh & Midway Coal Mining Co.*, 14 B.L.R. 1-135 (1990), the Board held that the ALJ properly took judicial notice of the qualifications of physicians as stated in the *Directory of Medical Specialists.* The Board noted that "[a]lthough claimant first became aware of the administrative law judge's use of judicial notice upon receipt of the administrative law judge's Decision and Order on Remand, claimant had an opportunity to contest the administrative law judge's finding before the Decision and Order became final by filing a motion for reconsideration with the administrative law judge." The Board noted that Claimant did not argue that the credentials noticed by the ALJ were inaccurate.

5. Criminal conviction of a physician

In *Boyd v. Clinchfield Coal Co.*, 46 F.3d 1122, 1995 WL 10226 (4th Cir. 1995) (table), the Fourth Circuit held that it was proper for the ALJ to take judicial notice of Dr. Vinod Modi's criminal conviction. Moreover, citing to *Adams v. Canada Coal Co.*, Case No. 91-3706 (6th Cir. July 13, 1992)(unpublished) (the ALJ "was obviously justified" in not crediting the testimony of Dr. Modi because of his conviction), the court upheld the ALJ's decision to accord no weight to Dr. Modi's medical opinion in light of his conviction for tax evasion. See also **Chapter 3: Principles of Weighing Medical Evidence.**

XIII. Reassignment/transfer of cases

A. Bias by original deciding judge

The Board holds that it has authority to order reassignment of a case to a different ALJ on remand if it determines that the original deciding judge exhibited bias against one of the parties. *Cochran v. Consolidation Coal Co.*, 16 B.L.R. 1-101 (1992).

In *Milburn Colliery Co. v. Director, OWCP [Hicks]*, 138 F.3d 524 (4th Cir. 1998), the court held that, considering the numerous legal errors made by the original administrative law judge, the claim should be reassigned to another ALJ on remand as it "requires a fresh look at the evidence, unprejudiced by the various outcomes of the ALJ's and Board's orders below . . .."

B. Unavailability of original deciding judge

1. On remand

The Chief Administrative Law Judge properly assigned a case on remand to a new ALJ without first giving Claimant notice. In this vein, the court held that:

> This is not a case where the matter was simply referred to another ALJ. Here, the original ALJ had left the agency, leaving remand as the only option. As to the notice problem, 29 C.F.R. § 18.30 states that if an ALJ is unavailable, the Chief ALJ 'may designate another administrative law judge for the purposes of further hearing or appropriate action.' No notice, so as to allow additional hearings or submissions, is generally required. New hearings are required only when the evaluation of credibility is crucial to resolving the factual disputes involved. The Chief ALJ, in his remand order in this case, stated that questions of credibility were not controlling, and the claimant has not made any specific arguments as to why such questions are controlling. The new ALJ, in order to address the errors made by the first ALJ, simply had to evaluate the evidence under a different standard. The Chief ALJ acted well within his discretion when he appointed the new ALJ.

Fife v. Director, OWCP, 888 F.2d 365 (6th Cir. 1989).

In *Strantz v. Director, OWCP*, 3 B.L.R. 1-431 (1981), the Board held that, pursuant to 5 U.S.C. § 554(d), "the same administrative law judge who heard the case the first time should hear the case on remand unless he is unavailable." If an ALJ is unavailable, then the parties must be notified, and they should be given "an opportunity to express any objections to the transfer of the case to another administrative law judge or request a *de novo* hearing." A new hearing should be held if credibility is at issue.

2. On modification

In *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388 (6th Cir. 1998), the court held that, because the original deciding ALJ was no longer with the agency, a modification case was properly reassigned to another ALJ after notice was provided to the parties. Claimant argued "that it was error to change the ALJ assigned to his case during the pendency of his proceeding." The court cited to 29 C.F.R. § 18.30 which authorizes the Chief ALJ to reassign a claim where the original deciding judge is no longer available. It then concluded that "[a]s no party objected to the reassignment after notice and because the proper procedures for reassignment were followed, we find no merit in Cunningham's argument."

XIV. Representatives

A. Right to representation

The Board has held that, pursuant to 5 U.S.C. § 555(b) and the regulations at 20 C.F.R. §§ 725.362-725.364, Claimant has the right to be represented by counsel at the hearing. *Shapell v. Director, OWCP*, 7 B.L.R. 1-304 (1984). A party may waive its right to be represented. 20 C.F.R. § 725.362(b).

1. The *pro se* claimant

a. Informing claimant of his or her rights

The ALJ must inform a *pro se* claimant of his or her right to be represented by counsel of choice without charge. Moreover, pursuant to § 725.362(b), the ALJ must determine whether a claimant's lack of representation is knowing and voluntary. If a claimant elects to proceed *pro se*, the ALJ, as an impartial adjudicator, has no special obligation to develop the evidence to enhance a claimant's case. Specifically, the Board held that providing a full and fair hearing means that:

> the administrative law judge has the responsibility to inform a *pro se* claimant of his right to be represented by a representative of his choice, at no cost to him, and to inquire whether claimant desires to proceed without such representation. If so, the administrative law judge must proceed to inform claimant of the issues in the case; allow claimant the opportunity to admit evidence and to object to admission of the adversary's evidence; and allow claimant the opportunity to provide testimony concerning relevant issues.

Shapell v. Director, OWCP, 7 B.L.R. 1-304 at 1-306 and 1-307 (1984). In this vein, the Board noted that although (1) Claimant agreed when the ALJ "presumed" Claimant wished to proceed without counsel and (2) the ALJ then "extensively questioned claimant as to his coal mine employment and his medical problems," the ALJ nevertheless denied the miner a fair hearing because:

> The administrative law judge merely inquired as to whether claimant wished to proceed *pro se* without informing him that he had a right to representation and that he would suffer no economic loss as a result of representation. The administrative law judge also failed to determine whether claimant's lack of representation was voluntary.

Id. at 1-307. It is important to note, however, that the Board remanded the case for consideration of pending motions and for a hearing but "reject[ed] the parties' requests for a *de novo* hearing because the administrative law judge fully performed his duties with respect to the conduct of the hearing itself" and "no party has asserted that a *de novo* hearing is necessary to further develop any testimonial evidence." *Id.* at 1-308.

In *Young v. Director, OWCP*, BRB No. 97-1411 BLA (June 24, 1998)(unpub.), the Board held, in a case arising in the Sixth Circuit involving a modification petition by a *pro se* claimant, that it was error for the ALJ to deny Claimant a hearing and to conclude that Claimant would proceed without counsel. Specifically, the Board stated the following:

> Section 6(a) of the Administrative procedure Act . . . grants claimant the right to be represented at the hearing. (Citations omitted).
>
> . . .
>
> In order to conduct a full and fair hearing, the Board has held that the administrative law judge must inform a *pro se* claimant of his or her right to be represented by a representative of his choice without cost to him and inquire whether claimant desires to proceed without representation. (Citations omitted). Furthermore, Section 725.362(b) requires that the administrative law judge determine whether claimant has made a knowing and voluntary waiver of his or her right to presentation. The administrative law judge must then proceed to inform claimant of the issues in the case, allow claimant the opportunity to admit evidence and to object to the admission of the adversary's evidence, and allow claimant the opportunity to provide testimony concerning relevant issues. (Citations omitted).

The Board concluded that, because the ALJ denied the parties a hearing on modification after determining that there were no issues involving witness credibility, he could not adequately determine whether Claimant intended to voluntarily proceed with her claim in *pro se* status. Moreover, the Board determined that, because the ALJ issued an order to show cause why a hearing was necessary to which Claimant failed to respond, the ALJ "improperly placed the burden on claimant to establish the necessity of a hearing." Citing to 20 C.F.R. §§ 725.450 and 725.461(a) and *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388 (6th Cir. 1998), the Board concluded that there had not been "a valid waiver of claimant's right to a hearing on modification."

b. Claimant's counsel fails to appear at hearing; whether to proceed

· **Proceeding is not *per se* error.** In *Laughlin v. Director. OWCP*, 1 B.L.R. 1-488, 1-490 (1978), the Board held that, under the circumstances of that case, it was proper for the ALJ to conduct the hearing where Claimant was unrepresented:

> While denial of the right to be represented by retained counsel would clearly be error, the fact that an administrative hearing was conducted at a time when the claimant was unrepresented is not error *per se*. Absent a clear showing of prejudice or unfairness in the proceedings, the lack of counsel is not grounds for remand if the claimant was fully informed of his right to be represented by counsel and subsequently elects to proceed without representation.

· **Inquiring whether claimant wants to proceed.** The ALJ acted properly, where Claimant appeared for hearing but his counsel did not, in inquiring whether Claimant wished to proceed after informing him of his rights with respect to the presentation of his case. The ALJ left the record open for 20 days to permit Claimant's counsel to offer evidence, which he did not do. The ALJ, in deciding to proceed with the hearing, noted that Claimant had: (1) traveled 400 miles to get to the hearing; (2) waited approximately five years for the hearing to take place; and (3) agreed to proceed without counsel after being asked on two occasions. *Prater v. Clinchfield Coal Co.*, 12 B.L.R. 1-121, 1-123 (1989).

· **Determining whether claimant has capacity to proceed.** It must be determined that the *pro se* party has the capacity to represent himself or herself. The Board noted that, upon review of the hearing transcript, "[t]he claimant either attempted to object to the introduction of some evidence, or did not understand what was being asked of him." As a result, the Board determined that the ALJ committed error in proceeding with the hearing. *York v. Director, OWCP*, 5 B.L.R. 1-833, 1-837 (1983), *overruled on other grounds, Shapell v. Director, OWCP*, 7 B.L.R. 1-304 (1984).

Indeed, under *Shapell v. Director, OWCP*, 7 B.L.R. 1-304 (1984), the ALJ must determine the complexity of the legal and medical problems presented in the case and must assess Claimant's ability to comprehend the issues and participate actively in their resolution. Factors to be considered include physical defects, age, formal education, apparent intelligence and general knowledge.

· **Leaving record open for post-hearing submissions**. It is within the ALJ's discretion to proceed with a hearing despite the absence of Claimant's counsel. The ALJ acted properly by inquiring whether Claimant wished to proceed without counsel after fully informing Claimant of his rights with respect to the presentation of his case. The ALJ also left the record open for the submission of post-hearing evidence by counsel. The Board concluded that, pursuant to 20 C.F.R. § 724.454(a), counsel failed to provide ten days' notice of his request for continuance and that his "scheduling conflict" did not

constitute "good cause" to grant a continuance. In particular, counsel notified the ALJ of a scheduling conflict 20 minutes after the hearing was to start. In denying the continuance, the ALJ noted that Claimant had: (1) traveled 400 miles to the hearing location; (2) waited five hours for the hearing to commence; and (3) chose to proceed without counsel when asked on two occasions. *Prater v. Clinchfield Coal Co.*, 12 B.L.R. 1-121 (1989).

2. Claimant fails to appear at hearing

The ALJ erred in awarding benefits on the record under 20 C.F.R. Part 727 where neither the Director nor Claimant requested a waiver of their right to a hearing in writing pursuant to 20 C.F.R. § 725.461. The Board noted that, although Claimant advised the ALJ in advance of the hearing that he would not be able to attend, the "Director submit(ted) that Claimant's unjustified failure to attend the hearing prejudicially deprived the Director of the right to examine, and that claimant's testimony (was) crucial to the resolution of the contested issue of total disability." The Board remanded the claim for issuance of an order to show cause why it should not be dismissed pursuant to § 725.465(c) which provides, in part, that "[i]n any case where a dismissal of a claim, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order." *Churpak v. Director, OWCP*, 9 B.L.R. 1-71, 1-72 and 1-73 (1986).

B. Disqualification of representative; appearance of impropriety

Pursuant to 29 C.F.R. §§ 18.34(g)(3) and 18.36, an administrative law judge may disqualify counsel for conflicts of interest or conduct prohibited by the applicable rules of professional conduct. *Baroumes v. Eagle Marine Services*, 23 B.R.B.S. 80 (1989). *See also Smiley v. Director, OWCP*, 984 F.2d 278 (9th Cir. 1993) (attorney's dual representation of claimant and, in an unrelated matter, the carrier who would pay judgment in claimant's favor). These regulations require the ALJ to give the parties notice and an opportunity to be heard regarding the disqualification of a representative.

It gave an appearance of impropriety where Claimant was represented by his son, a DOL-ESA-OWCP employee. However, the Board did not conclude that it was error for the ALJ to permit the representation where the son's supervisor approved of the representation and directed that no fees could be awarded to him in the event that Claimant prevailed. *Hayes v. Director, OWCP*, 11 B.L.R. 1-20, 1-22 (1987).

C. Party bound by acts of representative

Generally, a party is bound by the acts of its attorney. Where Employer's counsel failed to timely comply with the Board's filing requirements, Employer's appeal was properly dismissed with prejudice. The Sixth Circuit stated that the fact that "counsel may have been engaged in four thousand similar black lung cases and error-free in forty previous appeals is not persuasive." The court found that Employer had received due

process in so far as both the district director and the administrative law judge had reviewed the claim. *Consolidation Coal Co. v. Gooding*, 703 F.2d 230, 233 (6th Cir. 1983).

Claimant's argument that the inadequate performance of his counsel deprived him of the right to participate fully in the hearing was rejected. The Fourth Circuit reasoned that: (1) Claimant freely selected his attorney; (2) the attorney appeared with him at the hearing; (3) the ALJ appeared impartial; and (4) the record did not support a finding that the performance of counsel at the hearing was inadequate. *Collins v. Director, OWCP*, 795 F.2d 368, 375, 9 B.L.R. 2-58, 2-63 (4th Cir. 1986).

On the other hand, the extreme sanction of dismissal with prejudice is not appropriate without consideration of the client's conduct before binding him or her to the attorney's misfeasance. In this vein, the Board concluded that the ALJ erred in dismissing a claim where Claimant did not attend the hearing due to illness. Claimant advised her counsel who, in turn, failed to request a continuance or provide reasons for Claimant's failure to appear. The Board concluded that a rule permitting dismissal for want of prosecution:

> . . . cannot be mechanically applied to punish a party for the acts of his attorney. Dismissal with prejudice is an extreme sanction, and is warranted only if 'a clear record of delay or contumacious conduct by the plaintiff exist(s) . . . and a lesser sanction would not better serve the interest of justice.' (citation omitted).

Howell v. Director, OWCP, 7 B.L.R. 1-259, 1-262 (1983). The Board concluded that dismissal was not proper because Claimant forwarded the hearing notice to her former counsel expecting appropriate action to be taken. Further, Claimant's prompt action in responding to the show cause order by obtaining a new attorney and her overall pursuit of her claim did not indicate an intent to delay. The Board further noted that the Director "made no claim of prejudice from the delay." *Id*. at 1-262 and 1-263. *See also Link v. Wabash*, 370 U.S. 626, 630-31 (1962); *McCargo v. Hedrick*, 545 F.2d 393 (7th Cir. 1976); *Reizakis v. Coy*, 490 F.2d 1132 (4th Cir. 1974); *Flaska v. Little River Marine Construction Co.*, 389 F.2d 885 (5th Cir. 1968).

XV. Right of cross-examination

A. Generally

In accordance with *Richardson v. Perales*, 402 U.S. 389, 401 (1971) and the statutory provisions at 5 U.S.C. § 556(d), administrative proceedings must conform to the requirements of the Fifth Amendment. Section 556(d) provides that "[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

B. Waiver of right of cross-examination

The Director waived its right to present evidence challenging Claimant's entitlement to benefits when the Director did not contest entitlement at the hearing or on reconsideration, but raised the issue for the first time before the Board. *Kincell v. Consolidation Coal Co.*, 9 B.L.R. 1-221, 1-223 (1986).

Employer waived its right to "cross-examine the author of Claimant's Exhibit 1 and its right to access to the chest x-ray in question both by its failure to request issuance of a subpoena prior to or during the hearing and by its failure to object to the x-ray's submission into evidence at the hearing." The ALJ acted properly not only in admitting Claimant's Exhibit 1 into evidence, but also in denying Employer's motion for reconsideration and in refusing to reopen the hearing record. *Hoffman v. Peabody Coal Co.*, 4 B.L.R. 1-52 (1981) (it is noteworthy, that Claimant's Exhibit 1 contained a report diagnosing complicated pneumoconiosis based upon an x-ray study that was available at the time the case was pending before the district director and the exhibit was offered for admission into evidence in violation of the 20-day rule).

C. Improper denial of right of cross-examination

1. Delay in notifying employer of potential liability

In *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799 (4th Cir. 1998), the Fourth Circuit held that Employer was dismissed from the case and relieved of liability for the payment of benefits where "the extraordinary delay in notifying [Employer] of its potential liability deprived it of a meaningful opportunity to defend itself in violation of the Due Process Clause of the Fifth Amendment." The court set forth the lengthy procedural history of the claim and found that "[Employer] was finally notified of the claim on April 6, 1992, seventeen years after notice could have been given and eleven years after the regulations command that it be given." The court further noted the following:

> The problem here is not so much that Claimant died before notice to [Employer], but rather that he died many years after such notice could and should have been given. The government's grossly inefficient handling of the matter–and not the random timing of death–denied [Employer] the opportunity to examine [Claimant].

(emphasis in original).

2. Party's failure to cooperate during discovery

Employer was denied a full and fair hearing where it was deprived of the opportunity to have x-rays re-read or physicians deposed due to Claimant's lack of consent. *Kislak v. Rochester & Pittsburgh Coal Co.*, 2 B.L.R. 1-249 (1979).

D. The 20-day rule for exchanging evidence and "good cause"

Central to providing a fair hearing is that each party must have notice and an opportunity to be heard, which includes an opportunity to conduct cross examination. The 20-day rule is the centerpiece requirement for submission of evidence in black lung claims. The regulations at 20 C.F.R. § 725.456(b)(1) (2000) and (2001) provide that evidence, which has not been submitted to the district director, "may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim."[1] *See Amorose v. Director, OWCP*, 7 B.L.R. 1-899 (1985) (a medical report submitted more than 20 days prior to the hearing did not violate 20 C.F.R. § 725.446(b)(1)). This regulation is designed to eliminate surprise and to afford the parties adequate time to prepare its case.

The ALJ has discretion to admit evidence that is not exchanged in compliance with the 20-day rule if (1) the parties waive the 20-day requirement, or (2) "good cause" is demonstrated as to why such evidence was not timely exchanged.

This section contains a discussion of the "good cause" standard as it relates to exchanging evidence in compliance with the 20-day rule. For a discussion of the "good cause" standard as it relates to admitting evidence in excess of the limitations at 20 C.F.R. § 725.414 (2001), see **Chapter 4: Limitations on Admission of Evidence**.

1. Requiring exchange of evidence more than 20 days in advance of the hearing is permitted

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-53 (2004) (en banc), the Board concluded that it was proper for the ALJ to "rule on claimant's motions to exclude and order employer to identify which items of evidence it would rely on as its affirmative case pursuant to Section 725.414(a)(3)(i)" more than 20 days in advance of the hearing "because claimant explained that he was unable to proceed with development of admissible evidence under Section 725.414 until his motions to exclude excess evidence were decided." The Board noted that the ALJ left the record open for 45 days for Employer to respond and he "admitted two of the four items of post-hearing evidence that employer submitted in response to claimant's late evidence."

2. Exchange of evidence less than 20 days prior to hearing

The regulations at 20 C.F.R. § 725.456(b)(2) direct that waiver or "good cause" be established prior to admitting evidence not exchanged at least 20 days prior to hearing. Specifically, the ALJ is required to make a finding that "good cause" exists under § 725.456(b)(2) before admitting late evidence. *Jennings v. Brown Badgett, Inc.*, 9 B.L.R.

[1] It is noteworthy that the ALJ is not considered a "party." Specifically, the Board held that an ALJ misapplied the 20-day rule when he excluded a physician's deposition that was properly exchanged between Claimant and the Director solely because the ALJ had not received a copy of it 20 days prior to the hearing. *Luketich v. Director, OWCP*, 8 B.L.R. 1-477 (1986).

1-94 (1986), *rev'd on other grounds sub. nom., Brown Badgett, Inc. v. Jennings*, 842 F.2d 899 (6th Cir. 1988).

The Board similarly held that 20 C.F.R. § 725.456(b)(3) requires a preliminary determination of whether "good cause" exists for a party's failure to comply with the 20 day rule. *Conn v. White Deer Coal Co.*, 6 B.L.R. 1-979 (1984) (the ALJ improperly admitted a medical report and deposition not exchanged in accordance with the 20-day rule; error not corrected by offering to leave the record open where opposing party continued to object to admission of report and did not accept alternative of leaving the record open).

If there is no waiver and "good cause" is not established, the ALJ may either exclude the evidence from the record, *Farber v. Island Creek Coal Co.*, 7 B.L.R. 1-428 (1984), or remand the case to the district director for further development of the evidence. *Trull v. Director, OWCP*, 7 B.L.R. 1-615 (1984).

a. "Good cause" not established

· **Unreasonable delay.** Delay in obtaining evidence that was readily available does not support a finding of "good cause" to allow the untimely evidence. Some examples are:

- Medical report properly excluded where the employer failed to explain why it waited more than two and one-half years to secure a review of a pulmonary function study. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984);
- Proper to disregard a medical opinion that was not exchanged in accordance with the 20-day rule where counsel failed to submit while the record was kept open. *Kuchwara v. Director, OWCP*, 7 B.L.R. 1-167 (1984);
- In a similar vein, Employer's request for a continuance to obtain autopsy slides for an independent review properly denied where Employer had access to the slides for one year, but failed to secure them. *Witt v. Dean Jones Coal Co.*, 7 B.L.R. 1-21 (1984).

· **Knowledge of contents of late evidence not determinative.** A case was remanded for a determination of whether Employer established "good cause" as to why an affidavit had not been timely exchanged pursuant to 20 C.F.R. § 725.456(b)(2). The Board held that the fact that Claimant would not be surprised by the contents of the affidavit does not satisfy the "good cause" standard. *White v. Douglas Van Dyke Coal Co.*, 6 B.L.R. 1-905, 1-907 and 1-908 (1984).

· **Relevancy of late evidence not determinative.** "Good cause" is not established by mere reference to the relevancy of the evidence. The ALJ erred in admitting evidence which was mailed to the opposing party less than 20 days before the hearing on grounds that it was his intention "to consider all relevant medical evidence." While the ALJ

acknowledged that the opposing party's objection was "technically correct," he erroneously overruled it. *Conn v. White Deer Coal Co.*, 6 B.L.R. 1-979 (1984).

b. "Good cause" established

· **Evidence exchanged in connection with earlier state claim.** Good cause was established where evidence not exchanged 20 days prior to the hearing was nevertheless admitted on grounds that the evidence was sent to the opposing party "three years earlier in connection with a state claim (which) gave claimant's counsel reason to believe that employer's counsel already had a copy of the report." The Board noted that the ALJ left the record open for 30 days but the opposing party failed to respond to admission of the report. The Board held that it was proper to admit the report but cautioned that:

> Affirmance of the administrative law judge's exercise of discretion in this case . . . should not be construed as an endorsement of the view that documents exchanged in connection with an earlier state claim uniformly satisfy the 20-day rule. Documents, generally speaking, must be exchanged during the course of proceedings before the Department of Labor in order to satisfy the 20-day rule . . ..

Buttermore v. Duquesne Light Co., 7 B.L.R. 1-604, 1-607 (1984), *modified on recon.*, 8 B.L.R. 1-36 (1985).

· **Evidence to be used for impeachment purposes.** Pursuant to 20 C.F.R. § 725.456(b)(4) evidence is admissible, notwithstanding a violation of the 20-day rule if it is used for impeachment purposes. The Board remanded a case for the ALJ to consider whether a tape recording, which was not exchanged at least 20 days prior to the hearing, was admissible for impeachment purposes under § 725.456(b)(4). Claimant argued that the recording was of his conversation with a physician who stated that Claimant had "black lung," contrary to the diagnosis contained in the physician's written report. *Bowman v. Clinchfield Coal Co.*, 15 B.L.R. 1-22 (1991).

· **Examination more than 20 days before hearing; report not available until after hearing.** Where Claimant was examined shortly before the 20-day deadline and the medical report was not available for submission until after the hearing, "good cause" was established for its submission. However, the Board also noted that "[b]ecause employer never received a copy of the report and because the administrative law judge appears to have been unaware of this fact when employer moved to close the record, . . . due process requires that the case be remanded and the record be reopened for 60 days. *Pendleton v. U.S. Steel Corp.*, 6 B.L.R. 1-815 (1984).

3. Admission of late evidence; must allow responsive evidence

If late evidence is admitted, the regulatory provisions at 20 C.F.R. § 725.456(b)(3) require that the record be left open for 30 days to permit the filing of responsive evidence.

a. Record must be left open for both parties

It is important to note that the record must remain open for ***both*** parties to submit evidence. In *Baggett v. Island Creek Coal Co.*, 6 B.L.R. 1-1311 (1984), the ALJ admitted an x-ray re-reading by Employer on the grounds that Employer established "good cause" as to why the reading was not exchanged in compliance with the 20-day rule. The ALJ left the record open to permit the parties an opportunity to submit any further evidence. Claimant was subsequently granted two extensions of time to submit evidence, but Employer was denied an extension of time. The Board concluded that this was error because § 725.456(b)(2) requires that the record be left open for both parties.

b. Failure to timely submit responsive evidence– waiver of right of cross-examination

Employer was afforded due process where the ALJ reopened the record to admit an autopsy report, provided Employer with a copy, and waited more than 30 days for Employer to respond before issuing a decision. In failing to submit rebuttal evidence while the record was left open, Employer "waived" its right to cross-examination. *Gladden v. Eastern Assoc. Coal Corp.*, 7 B.L.R. 1-577, 1-579 (1984).

The Director, who was absent at a hearing, was precluded from objecting to admission of new evidence at the hearing. The ALJ properly left the record open for 30 days after the hearing pursuant to § 725.456(b)(3) for the Director to respond. However, the Director: (1) did not request notification of the newly submitted evidence; (2) made no attempt to ascertain what had transpired during the hearing; and (3) did not submit rebuttal during the 30 days in which the record was left open. *DeLara v. Director, OWCP*, 7 B.L.R. 1-110 (1984).

4. Admission of post-hearing evidence

a. Evidence submitted after the hearing

While the ALJ has broad discretion in procedural matters and may properly refuse to admit medical evidence submitted post-hearing, *Itell v. Ritchey Trucking Co.*, 8 B.L.R. 1-356 (1985) (the ALJ properly refused to reopen the record for post-hearing evidence "absent compelling circumstances or a showing of good cause"), s/he must provide rationale prior to issuing a decision for accepting or rejecting post-hearing evidence. *Covert v. Westmoreland Coal Co.*, 6 B.L.R. 1-1111 (1984).

For the propriety of conducting post-hearing medical examinations or submitting reports post-hearing, see **Chapter 26: Motions.** For submission of depositions post-hearing, see Part VI of this Chapter.

- **"Good cause" established; responsive evidence**. Where evidence is admitted post-hearing, then the ALJ must allow submission of responsive

evidence. In *Coughlin v. Director, OWCP*, 757 F.2d 966, 7 B.L.R. 2-177 (8th Cir. 1983), the court held that it was error for the ALJ to permit the Director to obtain a post-hearing re-reading of an x-ray study without providing Claimant with a copy of the re-reading or permitting him the opportunity to rebut the new reading. The court held that "fundamental concepts of fairness require that litigants be given equal opportunities to present their respective positions." *Id*. at 969.

Similarly, the Board concluded that, if the ALJ determines that a post-hearing affidavit regarding Claimant's work history was properly admitted, then Employer must be given an opportunity to "depose and cross-examine the affiant." *Lane v. Harmon Mining Corp.*, 5 B.L.R. 1-87, 1-89 (1982).

The ALJ reasonably concluded that "fairness" required the post-hearing admission of x-ray evidence and that "good cause" was implicitly found to exist. Specifically, Claimant's reading of an x-ray study was submitted in compliance with the 20-day rule "by only a few days" such that Employer was properly permitted to submit responsive evidence post-hearing. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149, 1-153 (1989)(en banc).

In *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-200 (1986), Claimant submitted the report of his physician immediately prior to the 20-day deadline and objected to admission of a rebuttal report based upon an examination conducted 18 days prior to the hearing. The Board held that the ALJ generally has broad discretion in dealing with the conduct of the hearing, but remanded the case to state that:

> Claimant's submission of Dr. Mastine's report just prior to the deadline imposed by the 20-day rule for submitting documentary evidence into the record, coupled with the administrative law judge's refusal to allow employer the opportunity to respond to claimant's introduction of the 'surprise' evidence, constituted a denial of employer's due process right to a fair hearing.

However, in *Owens v. Jewell Smokeless Coal Corp.*, 14 B.LR. 1-47 (1990)(en banc), the Board concluded that an employer's opportunity to respond does not automatically include having Claimant re-examined.

The Board has held that, even though Claimant was examined shortly before the 20-day deadline and the report was not available for submission until after the hearing, "good cause" was established for its submission. However, the Board also noted that "[b]ecause employer never received a copy of the report and because the administrative law judge appears to have been unaware of this fact when employer moved to close the record, we hold that due process requires that the case be remanded and the record be reopened for 60 days. *Pendleton v. U.S. Steel Corp.*, 6 B.L.R. 1-815 (1984).

- **"Good cause" not established.** Generally, "good cause" to submit evidence after the hearing will not be established if there was a delay in obtaining the evidence. In *Wagner v. Beltrami Enterprises*, 16 B.L.R. 1-65 (1990), the ALJ's denial of Claimant's request to develop and submit post-hearing evidence was proper where Claimant had received a continuance of a prior hearing for this purpose and where the evidence sought was not in Employer's possession as Claimant had argued.

The ALJ properly denied the Director's motion to keep the record open for submission of additional evidence when the Director sought to obtain medical records from the VA Hospital where Claimant retired due to a medical disability. The ALJ concluded that the Director had notice prior to the hearing that Claimant retired because of a disability and that medical records existed for the disability. Moreover, the Board concluded that 20 C.F.R. § 725.456(b)(2), requiring that evidence not exchanged at least 20 days prior to the hearing be excluded absent a showing of good cause or waiver, is applicable to the submission of post-hearing evidence as well as to evidence offered during the hearing. The ALJ is under "no affirmative duty to secure all material and probative evidence . . .." *Stephenson v. Director, OWCP*, 7 B.L.R. 1-212 (1984).

In *Shertzer v. McNally Pittsburgh Manufacturing Co.*, BRB No. 97-1121 BLA (June 26, 1998) (unpub.), the Board held that the ALJ erred in admitting evidence submitted on modification where the evidence was in existence at the time the ALJ issued his original decision. Specifically, the Board concluded that certain *Director's Exhibits* should not have been admitted as evidence on modification because "this evidence was in existence but was not made available to the administrative law judge at the time the administrative law judge issued his 1994 Decision and Order." The Board stated that 20 C.F.R. § 725.456(d) and *Wilkes v. F&R Coal Co.*, 12 B.L.R. 1-1 (1988) "mandate the exclusion of withheld evidence in the absence of extraordinary circumstances."

In *Thomas v. Freeman United Coal Mining Co*., 6 B.L.R. 1-739 (1984), the ALJ properly denied Claimant's request to submit a physician's affidavit on reconsideration regarding his cooperation and comprehension during a pulmonary function study conducted five years earlier. The ALJ concluded that Claimant failed to establish "good cause" as to why the evidence was not obtained earlier and submitted in compliance with the 20-day rule. The Board noted that, rather than timely requesting that the record remain open for submission of such evidence, "claimant did not obtain and attempt to submit (the physician's) affidavit until after issuance of the administrative law judge's decision denying benefits."

b. Evidence submitted on reconsideration

Admissibility of evidence submitted on reconsideration must be considered pursuant to 20 C.F.R. § 725.456(b)(2), *i.e.* "good cause" must be established for failure to submit it prior to the hearing in compliance with the 20-day rule. *Hensley v. Grays Knob Coal Co.*, 10 B.L.R. 1-88 (1987).

c. Reopening the record for submission of evidence

It is within the judge's discretion to reopen the record for the submission of evidence. 20 C.F.R. § 725.456(e). *See also Lynn v. Island Creek Coal Co.*, 12 B.L.R. 1-146 (1988), *aff'd on recon.*, 13 B.L.R. 1-57 (1989)(en banc); *Tackett v. Benefits Review Board*, 806 F.2d 640 (6th Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*). In particular, the ALJ must determine whether "manifest injustice" will result against either party in refusing to admit evidence on remand. *Cochran v. Consolidation Coal Co.*, 16 B.L.R. 1-101 (1992).

- **"Good cause" established.** One example where "good cause" to reopen the record on remand is established involves a change in the legal standard. The Board has held that the law in effect at the time a decision is rendered must be applied by the ALJ. *Berka v. North American Coal Corp.*, 8 B.L.R. 1-183 (1985); *Rapavi v. Youghiogheny & Ohio Coal Co.*, 7 B.L.R. 1-435 (1984).

  In *Toler v. Associated Coal Co.*, 12 B.L.R. 1-49 (1989)(en banc on recon.) the Board concluded that an ALJ may reopen the record on remand to accept evidence addressing a new legal standard.

  The Sixth Circuit has held that a substantive change in the law during the pendency of a claim warrants reopening the record at the earliest possible time for admission of evidence addressing the new standard. In *Harlan Coal*, the claim was heard by an ALJ and, after the record closed, but before issuance of a decision, the court issued *York v. Benefits Review Bd.*, 819 F.2d 134 (6th Cir. 1987), which significantly changed the rebuttal standard at § 727.302(b)(2). Thus, the court held that "[f]undamental fairness requires that Harlan Bell be granted an opportunity to address comprehensively the post-*York* standards." *Harlan Coal Co. v. Lemar*, 904 F.2d 1042, 14 B.L.R. 2-1, 2-9 (6th Cir. 1990).

  Similarly, in *Peabody Coal Co. v. Director, OWCP [Ferguson]*, 140 F.3d 634 (6th Cir. 1998), the court held that the ALJ erred in failing to consider evidence submitted by Employer on remand in support of § 727.203(b)(3) rebuttal. Specifically, the ALJ declined to reopen the record and reconsider his findings under subsection (b)(3) on remand because the Board "explicitly affirmed (his) finding and that there was no rebuttal under § 727.203(b)(3) of the regulations." The Board agreed. The Sixth Circuit, however, reasoned that the change in legal standard under subsection (b)(2) shifted emphasis to subsection

(b)(3) rebuttal. Indeed, the court noted that subsection (b)(3) became the less stringent rebuttal provision of the two subsections and stated the following:

> In the case at hand, Peabody presented new evidence as to (b)(2) and (b)(3), however, the ALJ refused to consider the new evidence as to (b)(3), and thus, only considered (b)(2) rebuttal. This was error. It is clear that Peabody was entitled to reconsideration as to both (b)(2) and (b)(3). (footnote omitted). Thus, in accord with (*Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 832 (6th Cir. 1997)), the Board committed a manifest injustice by denying Peabody full consideration.

In *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827 (6th Cir. 1997), the court reiterated that the administrative law judge must reopen the record to permit the introduction of evidence where there is a change in legal standard. Specifically, the court held that "when an employer rebuts the interim presumption under the pre-*York* standard applicable to § 727.203(b)(2), but not under the post-*York* standard, the BRB commits a manifest injustice if it refuses to allow the employer to present new evidence to the ALJ that the employer believes will establish rebuttal either under the post-*York* standards applicable to § 727.203(b)(2) *or another regulatory subsection*." (emphasis added).

- **"Good cause" not established.** "Good cause" to reopen the record is not established where the proffered evidence is "vague and unreliable." *Borgeson v. Kaiser Steel Coal Co.*, 12 B.L.R. 1-169 (1989)(en banc) ("good cause" to reopen the record was not established where the ALJ found that the proffered evidence was "vague and unreliable"). Moreover, "good cause" is not established based on a premise that the miner's condition is worsening. *White v. Director, OWCP*, 7 B.L.R. 1-348, 1-351 (1988) (although Claimant offered evidence on remand to demonstrate a worsening of his pulmonary condition, the ALJ was not bound to accept it, and the ALJ provided reasons for not doing so; the Board noted that the evidence could be submitted on modification before the district director).

XVI. Settlements and withdrawals of claims

A. Settlement of black lung claim prohibited

Settlement of claims under the Black Lung Benefits Reform Act is prohibited. *Lodigan v. Central Industries, Inc.*, 7 B.L.R. 1-192 (1984).

Moreover, 20 C.F.R. § 725.365 states that no fee charged for services rendered to a claimant shall be valid unless approved by the appropriate adjudication officer. Moreover, no contract or agreement for a fee shall be valid. *Goodloe v. Peabody Coal Co.*, 19 B.L.R. 1-91 (1995). In this vein, the Board has held that contingent and stipulated fee agreements are invalid. *Wells v. Director, OWCP*, 9 B.L.R. 1-63 (1986).

In *Eifler v. Peabody Coal Co.*, 13 F.3d 236, 18 B.L.R. 2-86 (7th Cir. 1993), the Seventh Circuit held that, even though attorney's fees may not be awarded before a final compensation award is entered, a settlement of attorney's fees may be approved before such a final award. Under the facts of *Eifler*, Claimant's counsel withdrew her petition for fees before the court stating that the parties had settled the claim for attorney's fees for $13,000. The court examined the terms of the settlement and noted, in approving the fee settlement, that "[a]s for the amount of compensation, the settlement provides that not a penny will come out of any award of compensation to Eifler. So he has nothing to lose."

B. Contingent withdrawal of controversion illegal

An agreement, stating that Employer will withdraw its controversion of Claimant's eligibility for medical benefits in return for Claimant's agreement to first submit all future medical expenses to alternative health carriers is illegal. The agreement would deprive Claimant of protection afforded him under the regulations. 20 C.F.R. §§ 725.701-725.707. *Gerzarowski v. Lehigh Valley Anthracite, Inc.*, 12 B.L.R. 1-62 (1988).

C. Remand for payment of benefits proper; withdrawal of controversion of issues

It is proper to accept the "Director's Motion to Remand for the Payment of Benefits" as a withdrawal of controversion of all issues. *Pendley v. Director, OWCP*, 13 B.L.R. 1-23 (1989)(en banc).

D. Withdrawal of claim

The regulations at 20 C.F.R. § 725.306 (2001) provide that the ALJ may grant a motion to withdraw a claim if it is *in the best interests of the claimant*. The following factors should be considered: (1) whether the Trust Fund has made payments to Claimant that have not been reimbursed (§ 725.306(a)(3) prohibits withdrawal if money is owed to the Trust Fund); (2) whether the ALJ has authority to enter an order granting withdrawal of the claim under *Clevenger v. Mary Helen Coal Co.*, 22 B.L.R. 1-193 (2002)(en banc) and *Lester v. Peabody Coal Co.*, 22 B.L.R. 1-183 (2002)(en banc); (3) whether granting a withdrawal of the claim could jeopardize a claimant's rights under 20 C.F.R. § 725.308 (2001) (the three year statute of limitations); and (4) whether granting a withdrawal would be in the best interests of the claimant overall.

Example where withdrawal was not in claimant's best interests. In *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739 (6th Cir. 1997), Claimant was found entitled to benefits, but refused payments from Employer, who was Claimant's long-time friend. Instead, Claimant sought payments from the Trust Fund. Employer stated that it failed to contest the claim "because it had relied on information from (Claimant) that any award would run against the Trust Fund and not against (Employer)." When Claimant was informed that he could not receive benefits from the Trust Fund, he requested a withdrawal of his claim, which was denied by the Board. Because Claimant did not join

Employer in its appeal of the Board's denial, the court held that Employer did not have "standing to appeal the withdrawal issue." The court stated that "it is clear that an employer is not the proper party to argue that its employee's best interests are served by allowing him to forfeit payments from the employer." The court further held that Employer could not be relieved of its liability for failure to timely controvert on grounds that it relied on Claimant's mistaken representation that the Trust Fund would be held liable for benefits. As a result, the court concluded that Employer failed to demonstrate "good cause" for its failure to timely controvert both the claim and its designation as the responsible operator. The court then upheld an order directing that Employer, a trucking company, secure the payment of $150,000 in benefits pursuant to 20 C.F.R. § 725.606.

For further discussion of withdrawals of claims, see **Chapter 26: Motions.**

XVII. Stipulations

A. Stipulation of fact

1. Binding when received into evidence

Stipulations of fact are binding when received into evidence. *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994).

A stipulation of fact is binding upon the parties and upon the trier-of-fact. *Nippes v. Florence Mining Co.*, 12 B.L.R. 1-108 (1985).

2. Stipulation against *pro se* Claimant's interest; not binding

In *Wilson v. Youghiogheny and Ohio Coal Co.*, 8 B.L.R. 1-73 (1985), the Board held that it was proper for the district director to list "total disability" as a contested issue notwithstanding the fact that the *pro se* Claimant stated that he was not totally disabled. In so holding, the Board reasoned that it was proper for the district director to implicitly find that the stipulation was not in Claimant's best interests.

B. Parties cannot stipulate to legal effect of stipulated facts

The Board holds that "[i]t is well-settled that the stipulations of parties with respect to the legal effect of admitted facts are not binding on a court." An ALJ "is not bound by any agreement of counsel on a question of law." *Casias v. Director, OWCP*, 6 B.L.R. 1-438, 1-443 n. 7 (1983).

XVIII. Subpoenas

A. ALJ has subpoena power when case pending before district director

In *Maine v. Brady-Hamilton Stevedore Co.*, 18 B.R.B.S. 129 (1986), the Board held that district directors do not possess the authority to issue subpoenas. The Board stated that, "[i]f a case is pending at the (district director's) level, and the issuance of a subpoena becomes necessary, the parties may simply apply to the Office of the Chief Administrative Law Judge for the proper adjudicatory officer to issue the appropriate subpoena."

B. Party's due process right limited to requesting subpoena

The ALJ did not violate Claimant's right to due process by denying his request for subpoenas. Claimant's due process right to a subpoena is limited to a right to request the subpoena. The ultimate issuance of the subpoena is a matter of the ALJ's discretion. Specifically, the ALJ concluded that the reasons for requesting the subpoenas, including obtaining the testimony of physicians who interpreted certain x-ray studies of record as negative, were insufficient. Claimant had argued that the physician's attendance at the hearing was necessary because responses to interrogatories would have been "'too extensive.'" The Board held that the ALJ was not required to provide any further explanation for his denial of Claimant's subpoena request. *Bowman v. Clinchfield Coal Co.*, 15 B.L.R. 1-22 (1991). *See also Souch v. Califano*, 599 F.2d 577, 580 n. 5 (4th Cir. 1979).

C. Party may be subpoenaed to attend hearing

Claimant has a right to a hearing, but s/he is not required to be present. The opposing party may subpoena Claimant to appear where the opposing party deems Claimant's testimony necessary. *Palovich v. Bethlehem Mines Corp.*, 5 B.L.R. 1-70, 1-72 and 1-73 (1982).

XIX. Summary judgment

A. *Sua sponte* authority to render summary judgment

1. ALJ has authority

The ALJ has authority to issue orders of summary judgment *sua sponte* where the parties have been given notice and an opportunity to respond. In this vein, the Board concluded that FRCP 56, permitting *sua sponte* summary judgment orders by a judge, applies to black lung proceedings because it is "not inconsistent" with 20 C.F.R. § 725.452(c). Under the facts of this case, the ALJ provided 100 days' notice of the hearings to be conducted and requested that the parties exchange evidence 40 days prior to the hearing. Thirty days before the hearing the ALJ *sua sponte* issued an order to show cause why the claims should not be denied based on the evidence received. The Board

held that the ALJ had authority to issue the order. However, it warned that such deviation from standard procedures was "strongly discouraged" because of the "negative" affect on the process. *Smith v. Westmoreland Coal Co.*, 12 B.L.R. 1-39, 1-43 (1988), *aff'd. sub nom., Henshew v. Royal Coal Co.*, 871 F.2d 417 (4th Cir. 1989)(table).

2. ALJ does not have authority

In *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425 (6th Cir. 1998), the Sixth Circuit reiterated its position in *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388 (6th Cir. 1998) that an ALJ is required to hold an oral hearing on modification upon request of a party. The *Robbins* court held the following:

> A hearing is not necessary if all parties give written waiver of their rights to a hearing and request a decision on the documentary record. (citation and footnote omitted). The only other instance in the regulations which permits a decision without holding a requested hearing is when a party moves for summary judgment, and the ALJ determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See 20 C.F.R. § 725.452(c). As the Director points out, '[t]here is no regulatory provision which would permit an administrative law judge to initiate summary judgment proceedings sua sponte.' (citation omitted).

B. Unresolved factual issues; summary judgment inappropriate

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the ALJ must deny a motion for summary judgment if there are unresolved factual issues. Specifically, the ALJ may not decide whether a prior or successor operator is the responsible operator where there is a factual issue of whether the successor operator actually gained control of the mine. *Montoya v. National King Coal Co.*, 10 B.L.R. 1-59, 1-61 (1986).